19 (1)

No.

IN THE SUPREME COURT OF THE
UNITED STATES

CARLTON SHAW,

Petitioner,

v.

BEAUFORT COUNTY SHERIFF'S
OFFICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. For the purposes of service of process, in a State where the office of Sheriff is recognized as a State office, must a Sheriff's Department or Office, when named as a defendant in a civil suit, be served as a State agency, or is service as a governmental subdivision sufficient?

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OPINIONS BELOW

The Court of Appeals for the fourth Circuit issued an Order affirming the District Court's dismissal of this case on Summary Judgment on November 13, 2008, without oral argument.

JURISDICTION

On November 13, 2008, the Appeals Court for the Fourth Circuit affirmed the District Court's dismissal of this case by the granting of the Respondent's Motion for Summary Judgment. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

None.

STATE STATUTORY PROVISIONS AT ISSUE

None

STATEMENT OF THE CASE

The Petitioner, Carlton Shaw, an African American Male, was a police officer for the New York City Police Department and served with the Department for about 17 years. He retired in 2002 and, when his wife was transferred to Beaufort South Carolina, as a permanently activated Naval Reserve Officer, Shaw moved with her.

In Beaufort, Shaw decided to continue to pursue employment in law enforcement, and, after applying for a position with the local sheriff's department, was appointed, on February 3, 2003, as a Deputy Sheriff for the Beaufort County Sheriff's Office (BCSO), the Respondent. Shaw then attended the South Carolina Police Academy as part of his preparation for active duty. Upon his return from a successful completion of training at the academy, BCSO assigned Shaw to field training under the supervision of Corporal Hall (white male). Based on his experience with the NYPD, Shaw had qualified to be a corporal. However, in contrast to white

deputies with less experience are given this rank immediately, his rank was kept in abeyance pending his completion of training through BCSO. Hall trained Shaw for seven (7) shift days using the BCSO's Officer Training Guide. During the training with Cpl. Hall, Shaw found many of Cpl. Hall's decisions on the job to be questionable at best. Cpl. Hall told Shaw to destroy a valid summons in an unlawful manor. Hall also ordered Shaw to engage in high speed pursuits of subjects who had engaged in very minor violations, even going so far as to tell Shaw to drive head on towards a fleeing suspect on an ATV. Cpl. Hall ordered Shaw to throw evidence "bong" (drug paraphernalia) containing marijuana into the ocean. Although Shaw kept the item and attempted to have it tested as evidence against the perpetrator, his request was denied by Sgt Slupski, another white officer. At the end of this training, Cpl. Hall issued a report citing several weak points, mainly on those areas where Shaw had found Hall's decisions to be

dangerous, like driving. On the other hand, Cpl. Hall did make several very positive comments about Shaw's abilities. Major Butler reviewed this report and recommended an additional seven (7) days of field training for Shaw under a different officer.

BCSO then assigned Shaw to train under Sgt. Slupski, who is a white male. In Slupski's performance evaluation of Shaw on May 14, 2003, Slupski praised Shaw for his relations with the public and the good judgment that he had exhibited on some calls. Early on during training session, Sgt. Slupski asked Shaw, "Do you think I am a racist?" He then went on to warn Shaw that Shaw might hear Slupski tell a racist or "watermelon joke" to his wife on occasion, and that Slupski did not "believe that whole slavery thing." In addition he stated during a phone call how much he hated black women. Shaw was taken aback and offended, but did not comment further as Slupski was a superior officer and responsible for determining whether Shaw would successfully complete his evaluation and

training for the Corporal position. Thereafter, Slupski began to refer to Shaw as "Bo" almost constantly. Shaw was unfamiliar with the term, but interpreted it as a shortening of the racially offensive term "boy." On two or more occasions, when Slupski was angry with Shaw and was preparing to have him go off shift, he called Shaw "Boy." Shaw recognized "Boy" when used in anger by a white man against an African American man to be a racist slur. Shaw was made to do all the work of his white coworkers and was told by Slupski that he was an inferior to white deputy's dispite their constant failures. Slupski went as far as to file a false criminal report against Shaw, but abandoned it when confronted by Shaw. He began to observe that Slupski and another Sergeant, Calandra (white male), used the term "bo" towards African American men, exclusively. Shaw, feeling that the constant use of these terms by his supervisor were oppressive, asked other African American officers and supervisors if "Bo" and "Boy" were

synonymous. Shaw was told that they were. Calandra, who was apparently not sure whether Shaw was partly of Latino descent, called him "Rico Suave" often, after a Latino singer, and asked him if he spoke Spanish. Calandra also would mimic a voice and accent which he told Shaw was a parody of an "uppity black person."

At the end of the two-week training with Slupski, Sgt. Slupski evaluated Shaw's performance as substandard, and recommended that he be terminated, or assigned to another unit, which did not include patrol. BCSO assigned Shaw to courthouse security detail. He was not awarded the rank of corporal.

Shaw was not given shotgun training despite his requests. On June 12, 2003, Sgt. Calandra (despite having failed the shotgun qualification himself) gave Shaw a substandard performance evaluation in shotgun qualification, despite Shaw having actually passed the course with a high score. Shaw was reassigned to Court House Security

Detail. Shaw's duties at the courthouse included scanning patrons at the front entrance, patrolling the courthouse, security in the courtroom, and did not include transporting a mobile file cabinet from the sheriff's office to the courthouse. From July 2003 to November 2003, Shaw received seven (7) performance evaluations while he was assigned to Court House Security Detail. The evaluations reveal that Shaw performed his courthouse duties well and in a professional manner, but despite his perfect driving record in the NYPD and the SC Academy, a concerted effort was made to prove that he was lacking in his driving abilities. In one evaluation written on September 12, 2003, by Cpl. Fyfe (white male), it was alleged by Cpl. Fyfe that Shaw had admitted to having vision problems as a possible reason for his poor driving performance. Cpl Fyfe told Shaw not to worry because all African Americans had trouble seeing in the dark. On November 15, 2003, Capt. Roper (white male) finally

released Mr. Shaw from training and approved him for duty.

On March 29, 2004, Shaw was stopped at a traffic light, while on duty in a county vehicle, when he was rear-ended by another driver. He sought treatment the same day at Doctor's Care under workers' compensation coverage. Shaw went to Doctor's Care on March 29, 2004. He was observed and discharged without further investigation or treatment.

While on duty at the Courthouse, Shaw met with Lt. Mattox (white male), a new supervisor, in late September, or early October of 2004. Shaw explained his concerns about the race discrimination and harassment he felt he had been subjected to while in his training phases. Lt. Mattox listened to the complaints. Mattox latter denied this under oath.

In November of 2004, Shaw continued to experience pain in his neck and back and mentioned it to Mr. Jan K. Watts of Risk Management. Sgt. Wade (black female). On

November 18, 2004, Lt. Mattox and Sgt. Wade spoke to Shaw about his medical problems and reprimanded Shaw for contacting Jan Watts for medical arrangement, the Beaufort County Risk Manager. Shaw was told not to proceed with medical treatment and verify if he is covered first through Mr. Watts.(Tape recorded evidence submitted)

As instructed, Mr. Shaw contacted the Jan Watts to request that he be evaluated for further treatment. In order to be seen by a doctor, the visit would have had to be approved through Mr. Watts' office. Jan Watts eventually informed Mr. Shaw that his workers' compensation claim had expired and that Shaw would have to seek medical treatment and a resolution of his claim through the private sector. Effectively, Mr. Watts stopped Mr. Shaw from accessing further evaluation and medical treatment for his motor vehicle accident injury. A week or so later, Sgt. Wade asked Shaw to move the file cabinet. He made the attempt, and felt a

sharp pain in his back. Shaw said "Ouch! I hurt myself!" Shaw was made to move cabinet anyway. He took several "Advil" aspirin type pain relievers, and worked out the rest of the day after responding to Cpl. Katrina Polite (black female) inquiry of his noticeable condition. On December 9th, about a week later Sgt. Wade called Plaintiff to her desk, and then told him to "never mind." She said that she was going to ask him to move the cabinet again. The next day, Dec 10th, Sgt. Wade asked Sgt. Fanger to handle moving the cabinet. Shaw was present and ready to help, but Sgt. Fanger told him to wait until they got another officer Cpl. Dennis Gains to help the sergeant move it, as the cabinet was heavy and unwieldy. While they were waiting, Capt. Roper called them into his office and demanded to know whether Shaw had been asked to move the cabinet, and whether he had refused to do it. Capt. Roper asked several questions about Shaw's medical condition, accused Shaw of never having contacted Watts at all (Wade claims to have

been aware, at this point that Shaw did contact Watts and was denied coverage for treatment, although she did not speak up in Shaw's defense). Roper suspended Shaw on the spot, apparently for failing to move the cabinet, but did not punish Fanger. Shaw was replace by Cpl Teterman (white male) who told Shaw he would have the position at the courthouse long before the incident or opening was made available. This would be after his return from retraining at the academy due to failure.

On December 10, 2004, Lt. Mattox recommended that Shaw be terminated, as did Sgt. Wade, who now claimed (post termination for the purpose of an amended answer to the court in this case), that she had ordered Shaw to report to her on what Watts had told him. Wade also claimed that Watts had instructed the Plaintiff to get further medical attention from a private physician in order to be evaluated for workers comp. treatment. On December 13, 2004, Lt. Col. David Brown also recommended that Shaw be

terminated. The termination took place on December 13, 2004, allegedly for insubordination.

Shaw made a complaint of discrimination, and, eventually, received a Right to Sue letter from the Equal Employment Opportunity Commission. He filed a lawsuit, alleging discrimination, retaliation, and wrongful termination under South Carolina Statutory law. The suit was filed in the South Carolina Court of Common Pleas for the County of Beaufort, and the Defendant named in the suit was the Beaufort County Sheriff's Office. Mr. Shaw has never attempted to sue the Beaufort County Sheriff, individually or as a State agent, himself. Shaw served the lawsuit by sending a certified letter and fee for service of process to the Sheriff's department, specifically, to the deputy and department in charge of civil process, requesting that the suit be served upon the sheriff, as the chief officer of the Beaufort County Sheriff's Office. The Defendant removed the case to Federal District Court, and then filed an answer in

Federal Court, claiming that service had not been properly affected based on the premise that the case was brought against a state officer or agency. A Sheriff, in South Carolina, is considered a State Officer, as he is appointed through the State legislature. Mr. Shaw has always maintained that the Sheriff's status as a state officer does not make the Sheriff's office a state agency, and that service was proper, as it was delivered to the BCSO civil service division, for service upon the Sheriff. The District Court and the Fourth Circuit Court of Appeals have determined that service was improper by finding that the BCSO is a state agency, rather than a local or municipal entity.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A STATE'S DESIGNATION OF A SHERIFF AS A STATE OFFICER REQUIRES THAT THE SHERIFF'S DEPARTMENT BE TREATED AS A STATE AGENCY FOR THE PURPOSES OF SERVICE OF PROCESS.

I. The Fourth Circuit erred in finding that service in this case did not comply with Rule 4(m), FRCP, because the case was properly served, and because the Court failed to properly apply, Rule 4(m), FRCP.

A. Mr. Shaw did commence this action within the applicable statute of limitation for his asserted claims under Title VII and S.C. Code 41-1-80.

Mr. Shaw brought claims under Title VII of the Civil Rights Act of 1946, 42 U.S.C. 2000e, et seq., which requires that an action be commenced within 90 days of the receipt of a Right to Sue letter from the EEOC. Baldwin

County Welcome Center v. Brown, 466 U.S. 147, 149-50 (1984). He also brought a South Carolina Statutory claim for wrongful termination because of a worker's compensation claim, which must be commenced within one year of the termination. S.C. Code 41-1-80 At Summary Judgment, the Appellant showed that the lawsuit was commenced, pursuant to Rule 3(a)(3) of the Federal Rules of Civil Procedure, within 90 days of the receipt of the Right to Sue Letter for the Title VII case, and within one year of the termination for the South Carolina statutory claim. The Federal Rules define commencement as:

> a Commencement. A civil action is commenced by filing with the clerk of court:
> (3) A summons and Complaint in all other actions.
> FRCP 3(a)(3)

In this case, the Plaintiff did file a Summons and Complaint with the Clerk of court within 90 days of the receipt of the Right to Sue letter. The Right to Sue letter,

being sent on August 31st (and received several days thereafter) and the filing taking place on November 21, 2005. The Termination was on December 13, 2004, which puts commencement of the lawsuit within one year for the South Carolina statutory claim. The Fourth Circuit adopted the District Court's findings on this issue. In the Final Order in this case, the District Court Judge affirmed that the Case was timely filed, but asserted that it had never properly been served. He also found that there was no good cause shown for failure to serve. The Petitioner argues that there has been good cause shown, and that service was, in fact, effective in this case.

B. Mr. Shaw did properly serve the Beaufort County Sheriff's Office, under the applicable rules of civil procedure.

1. The Court erred in finding that the Beaufort County Sheriff's Office is a State Agency.

The Fourth Circuit, adopting the

District Court' s Order and reasoning found that service was insufficient in this case as the Summons and Complaint were apparently delivered by certified mail. The District Court Judge (and the 4th Circuit, by adoption) came to this conclusion by taking the correct definition of the Sheriff as a Sate Officer, and assuming (incorrectly) that this means that the Sheriff's office is also a state agency, calling for an analysis of service under SCRCP 4(d)(5) (service on a State officer or agency) rather than under Rule 4d(6), which applies to governmental subdivisions, like the County Sheriff's Office. Although there is some state common law indicating that the Sheriff is considered a State Officer, there is no law showing that a county sheriff's *office* is a State Agency on par with DHEC or the S.C. Department of Corrections, for example. In this case, the Defendant is the Sheriff's Office, not the Sheriff.

As this case was originally filed in

South Carolina, in the Court of common pleas, and only removed to the Federal District Court, after service of process, the Courts should have looked to South Carolina rules and law governing service of process to determine whether the service had been proper. The issue of whether the Sheriff's Office (as opposed to the Sheriff, himself) arises sparingly in South Carolina common law, but there is mention of the Sheriff's *office* as a county subdivision, rather than a state agency. See Willis et al. v. Aiken County 203 S.C. 96, 26 S.E.2d 313 (1943). (In workman's compensation proceedings, deputy sheriff appointed by sheriff of county was officer of county, within Workmen's Compensation Act providing that term "employee" included all officers and employees of municipal corporation, so that death of deputy sheriff was compensable thereunder.) State ex Rel. Wolfe, Atty Gen. v. Sanders, 118 S.C. 498, 110 S.E. 808 (1920) ("But before attempting it, we dispose of it by

denying defendant's contention that Section 695 is not applicable to the office of sheriff, because that is not a county office, but a State office. Without taking the time to consider the cases cited in support of that contention, and show that they are not applicable or conclusive, it is enough to say that the status of the sheriff's office as a county office is conclusively determined by numerous acts of the Legislature which so classify and refer to it. One of these will be mentioned later. The sheriff's office is a county office and falls under the provisions of Section 695.")

The District Court, in its Order, and the Fourth Circuit, by adoption of the Order, cites a line of cases in which the Courts found that individual officers (Sheriffs and Deputies), sued in their individual capacities, under 42 U.S.C. 1983, are considered State Agents. See Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992). (In Cone, we specifically held deputies and sheriffs are state officials and therefore not liable in their

official capacity under § 1983.) These cases are good law, but they apply to suits against Sheriffs and Deputies in their individual capacities, rather than to the County offices of the Sheriff's Departments when they are sued as a department or office, rather than as an individual. Unlike 42 U.S.C. 1983, which applies to individual officers, Title VII allows a suit only against an employer, which, in this case is the Beaufort County Sheriff's Office, rather than the individual Sheriff.

Because the Sheriff's Office, rather than the Sheriff, was the Defendant in this case, and the Sheriff's Office is a municipal corporation, Rule 4d(6) of the South Carolina Rules of Civil Procedure apply for service of process. Rule 4(d)(6) actually requires a more direct and stringent process for service. It requires that the county subdivision be served by delivery of a copy of the Summons and Complaint to the chief executive officer. In this case, the Summons and Complaint were hand delivered, through the Sheriff's

office, to the Sheriff, himself. Rule 4d(5) only requires that a copy of the Summons and Complaint be delivered, by certified mail, to the State Attorney General, in Columbia. In this case, the service was effective and directly to the Sheriff, not as a Defendant, but as the chief executive officer of the Beaufort County Sheriff's Office.

C. A good faith dispute as to whether the Sheriff's office is a State Agency or not is good cause to find sufficiency of service of process where the case was properly served under the rules which apply to a municipal corporation, and the BCSO appeared and defended the case in response to that service.

As argued above, there is a good faith dispute in the law as to whether the Sheriff, being recognized as a State Officer, automatically makes the Sheriff's Office a State Agency. As is set forth above, South Carolina common law, although somewhat

sparse on the subject, seems to recognize the Sheriff's Office, or Department, as a municipal corporation. If it is a municipal corporation, then it was properly served. The District Court Judge and the Fourth Circuit erred in finding that there was no good cause before the Court for the Appellant having chosen to serve the Defendant under Rule 4(d)(6). The fact that the BCSO was actually served correctly pursuant to that rule, and that it certainly did not prejudice the Defendant in any way should be considered as good cause to find that there was proper service, or to simply order that the defect be cured, if the Court decided to rule that a South Carolina County Sheriff's Department is actually a State Agency.

CONCLUSION

For the reasons set forth above, Petitioner *CARLTON SHAW*, respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,

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*Member, Supreme Court Bar
Counsel for Carlton Shaw

No.

IN THE SUPREME COURT OF THE UNITED STATES

CARLTON SHAW,

Petitioner,

v.

BEAUFORT COUNTY SHERIFF'S OFFICE,

Respondent.

APPENDIX

Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 07-2076

CARLTON SHAW,

Plaintiff-Appellant,

Versus

BEAUFORT COUNTY SHERIFF'S OFFICE,

Defendant-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Sol Blatt, Jr., Senior District Judge. (9:05-cv-03253-SB)

Submitted: October 31, 2008 decided: November 13, 2008

Before MICHAEL, MOTZ, AND GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Chalmers C. Johnson, Renton, Washington, for Appellant., Mary Bass Lohr, HOWELL, GIBSON &HUGHES, P.A., Beaufort, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Carlton Shaw appeals the district court's order accepting the recommendation of the magistrate judge and granting judgment for the Beaufort County Sheriff's Office in Shaw's employment discrimination action. We affirm the district court's finding that the complaint is subject to dismissal without prejudice for insufficient service of process.* We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court in its analysis of the service of process issue. See Shaw v. Beaufort County Sheriff's Office, No. 9:05-cv-03253-SB, 2007 WL 2903940 (D.S.C. Oct. 1, 2007). We dispense with oral

argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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*Because we agree with the district court that service of process was not properly effected, we have not considered, and do not address, the court's alternative conclusion that Shaw's complaint fails on its merits.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CARLTON SHAW,	)
	)
Plaintiff,	)
	)C.A.No.9:05-3253-SB
	)
BEAUFORT COUNTY SHERIFF'S OFFICE,	)
	)
Defendant.	)ORDER

This matter is before the court upon plaintiff Carlton Shaw's ("the Plaintiff" or "Shaw") complaint, which alleges causes of action against his former employer, the Beaufort County Sheriff's Office ("BCSO"), for racial harassment, race discrimination, (disparate treatment), and retaliation in violation of title VII of the civil rights act of 1964, as amended, 42 U.S.C. 2000e, 17, as well as wrongful termination in violation of S.C. Code Ann. 41-1-80. The record contains a report and recommendation ("R&R") of a United States Magistrate Judge, made in accordance with

28 U.S.C. 636(b)(1)(B). In the R&R, the magistrate judge recommends that the Court grant the Defendant's motion for Summary Judgment. The Plaintiff filed written objections to the R&R, and the Defendant filed a reply to the plaintiff's objections. See 28 U.S.C. 636b1 (providing that a party may object to a magistrate judge's R&R within 10 days after being served with a copy. The matter is now ripe for review.

BACKGROUND

I. Procedural History

The Plaintiff filed the present action on November 21, 2005, then, on March 8, 2006, before an answer was filed, the Plaintiff filed an amended complaint. The Defendant filed its answer on April; 17, 2006, generally denying the Plaintiff's claims and also alleging that the Plaintiff failed to file the summons and complaint on the defendant. Thereafter, the Defendant filed an amended answer, again alleging that the Plaintiff failed to properly serve the summons and

complaint on the defendant and also alleging various affirmative defenses, such as the statute of limitations, and the plaintiff's failure to exhaust his administrative remedies. On December 13, 2006, the Defendant filed its motion for Summary judgment. The Plaintiff filed a response. In opposition to the Defendant's motion on January 16, 2007, and the Defendant filed a reply on January 25, 2007. The Plaintiff then filed an affidavit in opposition to the Defendant's motion for summary judgment. At the direction of the Magistrate Judge, the parties filed a joint factual brief in March of 2007. The magistrate judge then filed his R&R in May of 2007. The Plaintiff filed timely written objections to the R&R, and the Defendant filed a reply to the Plaintiff's objections.

II. Factual History

A. Stipulated Facts

The parties have stipulated to the following facts, as set forth in their joint factual brief:

1. The Beaufort County Sheriff appointed Carlton Shaw a deputy on February 3, 2003.

2. The Plaintiff is an African American Male.

3. Policies and procedures, including the Affirmative action plan, are established in the BCSO Standard Operating Procedures, including the internal complaint procedures, are made known to all deputies during training procedures.

5. The Plaintiff went to South Carolina Police Academy on February 23, 2003.

6. Upon his return from a successful completion of training at the academy, the Sheriff assigned the Plaintiff to seven days of field training under the supervision of Corporal Hall.

7. At the end of his training. Cpl. Hall issued a report citing the Plaintiff on several weak areas.

8. BCSO Major Darrell Butler reviewed this report and recommended an additional seven days of field training under BCSO sergeant Tim Slupski on May 14, 2003.

10. At the end of this training, Sergeant Slupski evaluated the Plaintiff's performance as substandard and recommended that he be terminated, retrained or assigned to another unit which did not include patrol.

11. The Plaintiff reviewed the written evaluation prior to its completion and submission.

12. Rather than terminating the Plaintiff, BCSO assigned him to the courthouse security detail.

13. After reassignment to the Courthouse, BCSO gave the Plaintiff additional training.

14. The Plaintiff's duties at the courthouse included scanning patrons at the front entrance, patrolling the courthouse, courtroom security and transporting a mobile file cabinet from the Sheriff's office to the courthouse.

15. On June 12, 2003, the Plaintiff received a substandard performance evaluation in shotgun training.

16. From July 2003 to November 2003, the Plaintiff received seven performance

evaluations that revealed he still needed improvement in his driving abilities.

17. On November 15, 2003, BCSO Captain Richard Roper released Plaintiff from raining and approved him for duty.

18. On March 29, 2004, the Plaintiff stopped at a traffic light while on duty in a county vehicle and was rear-ended by another driver.

19. The Plaintiff received a copy of the BCSO Standard Operating Procedure.

20. The Plaintiff reviewed and familiarized himself with all BCSO policies and procedures and at all times had access to the written policies and procedures.

21. The Defendant's employees on the job called the Plaintiff "Bo" on several occasions.

22. Initially the Plaintiff when to Doctor's Care, a temporary treatment office, but during his tenure with BCSO, he did not seek follow-up treatment from his primary physician.

23. On November 18, 2004, the Plaintiff told one of his supervisors, Sergeant

Jacquelin Wade. that he was still having medical problems from the motor vehicle accident.

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24. On November 18. 2004, Lieutenant Mark Mattox and Sergeant Wade spoke to the Plaintiff about his medical problems and told him to contact Jan Watts, the Beaufort County Risk Manager.

25. Shaw never reported back to either Sergeant Wade or Lieutenant Mattox with a status report.

26. On December 9, 2004, the Plaintiff told Sergeant Wade that he had not gone to the doctor because, "I don't like doctors and I am procrastinating."

27. On December 9. 2004. Sergeant Wade ordered Shaw to see a doctor immediately.

28. On December 10. 22004. Sergeant Wade recommended that BCSO terminate the Plaintiff for insubordination.

29. Lieutenant Mattox reviewed the situation and recommended the Plaintiff's termination to his superior, Captain Roper.

30. On December 13, 2004, Sergeant Wade, Lieutenant Mattox, Major Butler, Lieutenant Colonel David Brown and Chief deputy Michael Hatfield met with the Plaintiff to discuss potential termination, they gave the Plaintiff an opportunity to review all the recommendations and memos prepared by his superiors as well as ask questions and discuss the reason for his termination.

31. During the meeting in Chief Deputy Hatfield's office, the Plaintiff denied that his superiors ordered him to seek medical attention and refused to sign and date the disciplinary form.

32. The EEOC sent a Right to Sue letter on August 31, 2005.

33. The Plaintiff filed a complaint in the Beaufort Division of the U.S. District Court on November 21, 2005, and an Amended Complaint on March 24, 2006.

34. The Plaintiff sent the Complaint to the Defendant by certified mail.

35. The Plaintiff did not personally serve the Sheriff or his clerk.

(Joint factual Brief at 1-4)

B. The Plaintiff's Statement of Disputed Facts and the Defendant's Response.

I In addition to the stipulated facts set forth above, the Plaintiff provided a list of facts that he contends are in dispute, and the Defendant responded to the Plaintiff's list. The Court has included the Defendant's corresponding response below each of the Plaintiff's disputed facts.

Plaintiff's Disputed Fact #1: Plaintiff retired from the NYPD in 2002, and accompanied his wife to South Carolina. She was stationed in Beaufort as a permanently activated Reserve Naval Officer. (Shaw Affidavit 7-10)

Defendant's Response:

The fact that the Plaintiff left the NYPD in 2002 is not in controversy: however, this fact is irrelevant, as is any reference to his wife or his duty station.

Plaintiff's Disputed Fact # 2:

The Plaintiff successfully completed training at the academy, before being assigned to field training under the supervision of Corporal

Hall.

Defendant's Response:

These facts are not in controversy; however, for clarification. the Plaintiff was first assigned to Field Training with Officer Rodriguez, then Officer Hall, then Sgt. Slupski, and finally, office Norberg.

Plaintiff's undisputed Fact # 3:

Based on his experience with the NYPD, Plaintiff qualified to be a corporal. However, this rank was kept in abeyance pending his completion of training under another officer.

Defendant's Response:

These facts are in controversy because the Plaintiff would not qualify to be a corporal until he successfully passed field training. Plaintiff did not complete his initial training and had difficulty throughout his orientation and field training. His trainers finally cleared him from training and assigned him to the courthouse where he was given the rank and pay of a corporal.

Plaintiff's Disputed Fact # 4:

Hall was Plaintiff's supervisor and trained

the Plaintiff for seven (7) shift days.

Defendant's Response:

These facts are not in controversy.

Plaintiff's Disputed Fact # 5:

Cpl. Hall told Plaintiff to destroy a valid Summons. (Shaw Affidavit 17)

Defendant's Response:

This fact is in controversy and is irrelevant to the lawsuit. Cpl Hall could not destroy a summons which is a numbered citation for which the deputy is accountable. Cpl. Hall ordered destruction of a written notice, a computer generated slip used to notify personal of court dates, roll call, etc.

Plaintiff's Disputed Fact #6:

Hall ordered Shaw to engage in dangerous pursuits of subjects who had engaged in very minor violations, even going so far as to tell Shaw to drive head on towards a dune buggy. (Shaw Affidavit 18-19)

Defendant's Response:

These facts are in controversy and are irrelevant to the lawsuit. Hall ordered Shaw on one occasion to pursue a fleeing individual

driving a stolen ATV. Hall ordered pursuit, not a head on collision course.

Plaintiff's Disputed Fact # 7: Cpl Hall ordered Plaintiff to throw a bong (drug paraphernalia), into the ocean. Shaw kept it and attempted to have it tested as evidence against the perpetrator. His request was denied. (Shaw Affidavit 22)

Defendant's Response:

This fact is in controversy and is irrelevant to the case.

Plaintiff's Disputed Fact # 8:

At the end of this training, Cpl. Hall issued a report citing several weak areas, mainly on those areas where Plaintiff had found Hall decisions to be dangerous, like driving. On the other hand, Cpl. Hall did make several very positive comments about Shaw's abilities. Major Butler reviewed this report and recommended an additional seven (7) days of field training under a different officer.

Defendant's Response:

The fact that Cpl. Hall did make positive comments in those areas that he found the

Plaintiff merited the comment is not in controversy; however, Hall's evaluation of the Plaintiff revealed weaknesses in his knowledge of SC

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Statutes and laws, poor report writing, poor radio protocol, no sense of urgency when responding to calls, and questionable driving abilities. (See Exhibit 2 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 9

The Plaintiff then began training under Sgt. Slupski on May 14, 2003. In Slupski praised the Plaintiff for his relations with the public and the good judgment plaintiff exhibited on some calls.

Defendant's Response:

The fact that Sgt. Slupski attempted to praise Shaw where warranted and tried to give Shaw a clean slate to assist him in a fresh approach to training is not in controversy. (See Exhibit 2 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 10:

During the early part of the training, Sgt. Slupski, while in the vehicle with Shaw, asked Shaw, do you think I'm racist? He then went on to warn Shaw hat he might hear Slupski tell a race or watermelon joke to his wife on occasion, and that Slupski did not believe in that whole slavery thing. (Shaw Affidavit 63-64)

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 11:

Thereafter, Slupski began to refer to Plaintiff as "Bo" almost constantly. (Shaw Affidavit 65).

Defendant's Response:

The fact that Sgt. Slupski referred to Plaintiff as "Bo" is not in controversy. However, for clarification, Sgt. Slupski only occasionally referred to the plaintiff using the term "Bo" as a non-racist, general term used by many persons in the low country as a friendly greeting.

Plaintiff's Disputed Fact # 12

On one occasion, when Slupski was angry with Plaintiff and was preparing

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To have him go off shift, he called the Plaintiff "boy." (Shaw Affidavit 67) Shaw recognized "boy" when used in anger by a white man against an African American man to be a racist slur.

Defendant's response:

These facts are in controversy.

Plaintiff's Disputed Fact # 13

Plaintiff observed that Slupski and another Sergeant, Calandra, used the term "bo" towards African American men exclusively.

Defendant's Response:

This fact is in controversy.

Plaintiff's Disputed Fact # 14

Plaintiff asked other African American officers and supervisors if bo and boy were synonymous. They told him that they were. (Shaw Affidavit 69)

Defendant's Response

The fact is in controversy.

Plaintiff's Disputed Fact # 15

Specifically, Sgt Harris told Plaintiff that he interpreted bo to be short for boy and a racial slur towards African Americans. (Affidavit of Harris)

Defendant's Response:

Sgt. Harris submitted an affidavit which speaks for itself.

Plaintiff's disputed Fact # 16

Calandra, one of Plaintiff's training Supervisors, who may have believed that Plaintiff was partly of Latino descent, called him Rico Suave after a Latino singer, and asked him if he spoke Spanish. (Shaw Affidavit 70).

Defendant's Response:

These facts are in controversy.

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Plaintiff's Disputed Fact # 17:

Calandra also would mimic a voice and accent which he told Shaw was a parody of what he referred to as an uppity black person (Shaw Affidavit 71).

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 18:

After being assigned to the Courthouse, Plaintiff was given further training while at the courthouse. From July 2003 to November 2003, the Plaintiff received seven (7) performance evaluations while he was assigned to Court House detail. The evaluations reveal the Plaintiff performed his courthouse duties well and in a professional manner.

Defendant's Response:

The fact that Plaintiff received 7 evaluations while he was assigned to the courthouse is not in controversy; however, for clarification, not all of the evaluations reflect Plaintiff performed well and professionally. (See Exhibit 3 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact #19

Sgt. Harris, Plaintiff direct supervisor, evaluated the Plaintiff as performing his duties well at the Courthouse. (Harris Affidavit)

Defendant's Response:

Sgt. Harris submitted an affidavit which speaks for itself.

Plaintiff's Disputed Fact # 20:

Corporal Fyfe (white officer) was Plaintiff's training supervisor for driving at one point. In one evaluation written on September 12, 2003, by Cpl. Fyfe, it was noted that the Plaintiff admitted to having night vision problems as a possible response for his poor driving performance. This came on the heels of a night driving incident. Cpl. Fyfe told Plaintiff not to worry because all African Americans had trouble seeing in the dark. (Shaw Affidavit 73).

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 21:

On November 15, 2003, Capt. Roper released Plaintiff from training and approved him for duty.

Defendant's Response:

The fact that Captain Roper released Plaintiff from training and approved him for duty is not in controversy; however, for clarification,

Plaintiff was released for courthouse security duty, not for road patrol. (See Exhibit 2 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 22:

On March 29, 2004, the Plaintiff was stopped at a traffic light, while on duty in a county vehicle, when he was rear ended by another driver. He sought treatment the same day at Doctor's Care under worker's compensation coverage. Plaintiff went to the Doctor's care under worker's compensation coverage. Plaintiff went to Doctor's care one time on March 29, 2004. He was observed and discharged. (Shaw Affidavit 93)

Defendant's Response

These facts are in controversy.

Plaintiff's Disputed Fact # 23:

While on duty at the courthouse, Shaw met with Lt. Mattox, a new supervisor, in late September, or early October of 2004. Shaw explained his concerns about the race discrimination and harassment he felt he had been subjected to while in his training

phases. Lt. Mattox listened to the complaints. (Shaw Affidavit 79)

Defendant's Response:

These facts are not in controversy.

Plaintiff's Disputed Fact # 24:

In November of 2004, the Plaintiff's pain in his neck and back reestablished. Plaintiff decided he had a more serious injury and mentioned it to Sgt. Wade.

Defendant's Response:

The fact that the Plaintiff mentioned his back was still hurting from the accident is not in controversy; however, for clarification. Sgt. Wade told

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Plaintiff to see a doctor and take care of the injury. The Plaintiff did not follow her order to seek medical treatment. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 25

On November 18, 2004, Lt. Mattox and Sgt. Wade spoke to the Plaintiff about his medical problems and told him to contact Jan Watts.

the Beaufort County Risk Manager. (Shaw Affidavit 44)

Defendant's Response:

The fact that Lt. Mattox and Sgt. Wade spoke to the Plaintiff about his medical problems is not in controversy; however, for clarification, both Sgt. Wade and Lt. Mattox ordered the plaintiff to see a doctor and take care of the injury and to pursue his worker's compensation claim. The Plaintiff did not follow these directives. (See Exhibit 8 to Defendant's Memorandum in support of Summary Judgment.)

Plaintiff's Disputed Fact # 26

At the November 18. 2004 meeting, Shaw again told Mattox that he felt like he had been treated unfairly during his training because of his race, and mentioned being subjected to racist comments by his training supervisors. (Shaw Affidavit 80)

Defendant's Response

These facts are in controversy.

Plaintiff's Disputed Fact # 27

As instructed, Plaintiff contacted Jan Watts

to request that he be evaluated for further treatment. It was at this time that Plaintiff was informed by Jan Watts that his workers compensation claim had expired and that Plaintiff would have to seek medical treatment and a resolution of his claim through the private sector (pay for his own medical treatment and sue the other driver privately to seek compensation for his medical bills.) (Shaw Affidavit 54-56; Exhibit #2 to Plaintiff response to Summary Judgment, a letter from Jan K . Watts.)

Defendant's Response:

The fact that the Plaintiff was told by Jan Watts that his claim had expired and that his claim had expired is not in controversy; however, for clarification, the plaintiff never followed up

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On medical treatment and therefore the time to pursue his claim expired. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment).

Plaintiff's Disputed Fact # 28

A week or so after his meeting with Lt. Mattox and Sgt. Wade, Plaintiff was working in the Courthouse when Sgt. Wade asked Plaintiff to move the file cabinet. He made the attempt, and felt a sharp pain in his back. He said "Ouch! I hurt myself!" Sgt. Massey was present and observed this. Plaintiff notified her that he had hurt his back. He took several Advil and worked out the rest of the day after reporting the incident to Katrina Polite. (Shaw Affidavit 49).

Defendant's Response:

These facts are in controversy because Sgt. Massey was never employed by the Defendant and is an employee of the Port Royal Police department. In addition, Katrina Polite was never in a supervisory position over the Plaintiff thus any report the Plaintiff made to Katrina Polite of his injury would not be in accordance with Defendant's chain of command protocol.

Plaintiff's Disputed Fact # 29

On December 9, about a week one (1) later, Sgt. Wade called Plaintiff to her desk, and

then told him to never mind she was going to ask him to move the cabinet again, but had decided to ask Sgt. Fanger to handle it instead, as Shaw had reminded her that his back was still hurting. (Shaw Affidavit 51)

Defendant's Response

These facts are not in controversy.

Plaintiff Disputed Fact # 30

The next day, Sgt. Wade asked Sgt. Fanger to handle moving the cabinet. Shaw was present and ready to help, but Sgt. Fanger told him to wait until they got another officer to help them. While they were waiting, Capt. Roper called them into his office and demanded to know whether Shaw had been asked to move the cabinet and whether he had refused to do it. Capt. Roper asked several questions about Shaw's medical condition, accused Shaw of never having contacted Watts at all (Wade claims to have been aware, at this point that Shaw did contact Watts and was denied coverage for treatment, although she did not speak up in Shaw's defense). Roper suspended Plaintiff on the spot, but did not

punish Fanger. (Shaw Affidavit

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Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 31

On December 10, 2004, Lt. Mattox recommended that Shaw be terminated, as did Sgt. Wade, who now claimed that she had ordered Shaw to report to her on what Watts had told him. Wade also claimed that Watts had instructed the Plaintiff to get further medical attention from a private physician in order to be evaluated for workers comp. treatment.

Defendant's Response:

The fact that Lt. Mattox and Sgt. Wade recommended Shaw's termination is not in controversy, however, for clarification both recommendations were for insubordination, failing to get medical attention. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 32

On December 13, 2004, Lt. Col. David Brown also recommended termination of the Plaintiff. The Plaintiff was terminated on December 13, 2004, allegedly for insubordination.

Defendant's Response

This fact is not in controversy

Plaintiff's Disputed Fact # 33

At the time that the Plaintiff was terminated, the insubordination that Defendant claimed Plaintiff had committed was allegedly refusing to follow up with Jan K. Watts or not cooperating with Mr. Watts office in order to get workers compensation treatment for his injuries.

Defendant's Response:

These facts are not in controversy; however, for clarification. Plaintiff was insubordinate in not following through on his worker's compensation claim and medical treatment even though he was still injured from the accident. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment).

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Plaintiff's Disputed Fact # 34

After his termination, Plaintiff contacted Mr. Watts and Mr. Watts wrote Plaintiff a letter, explaining that Mr. Shaw had contacted him when Shaw said he did, that Mr. Watts had told Shaw that there was no workers' compensation coverage, and that Shaw would have to pursue any treatment at his own expense, and, finally, that Mr. Shaw had not failed to comply or cooperate with Mr. Watts' department. This letter is attached as Exhibit #2 to the Plaintiff Response to Summary Judgment.

Defendant's Response:

These facts are not in controversy; however, for clarification, there was no longer worker's compensation coverage because the Plaintiff allowed the claim to expire by not following up with medical treatment needed for his full recovery. (Se Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment.)

STANDARD OF REVIEW

To grant Defendant's motion for summary judgment, the Court must find that "there is no genuine issue as to any material fact." Fed.R.Civ.P.56(c). The Judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). All evidence should be viewed in the light most favorable to the non-moving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

Party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The "obligation of the non-moving party is 'particularly strong when the nonmoving party bears the burden of proof." Hughes v. Bledsole, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990)). Summary Judgment is not "a disfavored procedural shortcut "but an important mechanism for weeding out "claims and defenses [that] have no factual bases."*Celotex*, 477 U.S. at 327.

II. The Magistrate Judge's R&R

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the Court. Matthews v. Weber, 423 U.S. 261, 269 (1976). The Court reviews de novo those portions of the R&R to which a specific objection is made and the Court may accept, reject, or modify in whole or in part, the recommendation of the

Magistrate Judge. or recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. 636(b)(1)(C).

DISCUSSION

In the 38-page R&R, the magistrate Judge first addressed the Defendant's assertion that the Plaintiff failed to serve the summons and complaint. 1 Then, even though the Magistrate Judge recommended dismissal without prejudice for failure to timely effect service, the Magistrate Judge also addressed each of the Plaintiff's claims on the merits

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1 The Defendant asserted in its answer, amended answer, and memorandum in support of its motion for summary judgment that the Plaintiff's complaint should be dismissed pursuant to Rules 12(b)(5) and/or 12(b)(6) of the Federal Rules of Civil Procedure due to the insufficiency of the service of process and consequent lack of personal jurisdiction.

And concluded that the Defendant was

entitled to summary judgment. The Court will first address the issue of service.

I. Whether the plaintiff timely and properly effected service of the summons and complaint?

Under Title VII, a claimant must file suit within 90 days after receipt of a right to sue letter from the United States Equal Employment Opportunity Commission ("EEOC"). See 42 U.S.C> 2000e-5(f)(1). If suit is not filed within this 90 day period, the claimant forfeit's the right to pursue the claim. See Baldwin County Welcome Center v. Brown, 466 U.S. 147, 149-50 (1984); Darden v. Cardinal Travel Ctr., 493 F.Supp. 2d 773, 775 (4th Cir. 2007). Here, the EEOC right to sue letter was dated August 31, 2005, and the Plaintiff timely filed his complaint on November 21, 2005, some 83 days after the date of the right to sue letter.

In addition to timely filing his complaint, however, the Plaintiff also needed to timely serve the Defendant, the Beaufort County Sheriff's office with the summons and

complaint. The Federal Rules of Civil Procedure provide plaintiffs with "120 days after the filing of the Complaint" to serve defendants with the summons and complaint. Fed. R.Civ.P. 4(m). Rule 4(m) provides:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed.R.Civ.P.4(m).

Here, the Plaintiff filed his initial complaint on November 21, 2005, but he never served it on the Defendant. Then, in March of 2006, the Plaintiff filed an amended

Complaint and attempted to serve it on the Defendant by mailing a copy of the amended

complaint to the Defendant on March 24, 2006, some 123 days after filing the initial complaint. In its answer and its amended answer, the Defendant raised the affirmative defense of failure to timely serve the summons and complaint.

Although the district court has authority to extend the time for service beyond the 120-day period, the discretionary authority is based on a plaintiff establishing good cause for the failure to serve defendants. See Anderson v. City of Rock Hill, Slip Copy, 2007 WL 3986035, *2(D.S>C> April 15, 2005) (citing Mendez v. Elliot, 45 F.3d 75, 79 (4th Cir. 1995)). In Anderson, Judge Currie rejected the plaintiff's stated reasons for his failure to serve the defendants within the 120 day time period. Specifically, Judge Currie determined that eh plaintiff's stated reasons (that he was busy pursuing an action in the state court; that he was busy seeking employment; hat service through the local sheriff's department was too costly and he therefore endeavored to find addresses for

service himself and that he was proceeding pro se) did not meet the standard of good cause. Id. In dismissing the plaintiff's complaint without prejudice, Judge Currie noted that "without prejudice does not mean without consequence," as the Plaintiff's statute of limitations period for filing a suit under Title VII had expired, preventing him from refiling and properly effecting service. Id. (quoting Powell v. Starwalt, 866 F.2d 964. 966 (7th Cir. 1989)) (Internal quotations omitted).

In the present case, contrary to Anderson. the Plaintiff has not requested that the Court grant him an extension of time to properly effect service; nor has the Plaintiff showed any good cause for his failure. Moreover, the Plaintiff has been on notice since April of 2006 that he failed to timely effect service but has done nothing to correct the error.

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In addition to the Plaintiff's failure to timely serve the Defendant. it appears that the

Plaintiff failed to properly serve the Defendant. Rule 4(j)(2) of the Federal Rules of Civil Procedure provides:

> Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

Fed. R. Civ. P. 4(j)(2). In South Carolina, sheriffs are stat officials, and sheriff's departments are state agencies. See Gulledge v. Smart, 691 F.Supp. 947, 954-55 (D.S>C> 1988); Clone v. Nettles, 308 S.C. 109, 112 (1992); Barnes v. Spartanburg County Sheriff's office, Slip Copy, 2007 WL 1377564, *6(D.S.C. May 7, 2007). Rule 4(d)(5) of the South Carolina Rules of Civil Procedure provides that service upon an officer or agency of the state be effected "by delivering a copy of the summons and complaint to such

officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia." S.C>R.Civ.P. 4(d)(5); see also Maybin v. Northside Correctional Center, 891 F.2d 72, 73 (4th Cir. 1989) (emphasizing rule 4(d)(5)'s requirement that service upon an officer or agency of the state b effected by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General).

Here, the Plaintiff did not "deliver a copy of the summons and complaint" to the sheriff or his clerk, and the Plaintiff did not send a copy by registered or certified mail to the Attorney General. Instead, the Plaintiff simply mailed the summons and complaint to the Defendant via certified mail. This is improper under both state and federal rules. Furthermore, as previously mentioned, the Plaintiff have been on notice since April of 2006

That the summons and complaint were not properly served; yet the Plaintiff has done nothing to correct the errors. Based on the foregoing, the court agrees with the Magistrate Judge's recommendation that the Plaintiff's Complaint should be dismissed without prejudice for failure to timely and properly serve the Defendant.

A. The Plaintiff's Objections

In his objections, the Plaintiff first objects to the Magistrate Judge's application of rule 4(d)(5) of the South Carolina Rules of Civil Procedure. The Court finds this objection without merit and finds the Magistrate's application of rule 4(d)(5) to be proper.

Next, the Plaintiff objects to the Magistrate Judge's finding that the Court does not have personal jurisdiction over the Defendant, arguing that the Defendant made a general appearance and waived its right to raise the issue of personal jurisdiction.. The Plaintiff asserts that the Defendant "never

raised personal jurisdiction or sufficiency of service in a pre-answer motion to dismiss. Rule 12 of the Federal Rules of Civil Procedure allows for a Defendant to raise such issues because filing an Answer and engaging in further litigation and requires that it be done that way." (Obj. at 3)

The Court finds this objection without merit and founded on an incorrect interpretation of the law. Specifically, contrary to the Plaintiff's assertion, Rule 12 of the Federal Rules of Civil Procedure does not require that the Defendant raise the issue of personal jurisdiction or insufficiency of service of process in a pre-answer motion to dismiss. Rule 12(b) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made my

Motion:

(1) lack of jurisdiction over the subject matter.

(2) lack of jurisdiction over the person.

(3) improper venue,

(4) insufficiency of service of process,

(5) failure to state a claim upon which relief could be granted,

(7) failure to join a party under Rule 19

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

Fed.R.Civ.P.12(b) (emphasis added). Thus, these "seven enumerated defenses may be made by a single preliminary motion or by a responsive pleading, whichever appears more advantageous to the party who wishes to assert the defense ore defenses." 5B Charles Allen Wright & Arthur R> Miller, Federal Practice and Procedure 1347 (3d ed. 2004). Rule 12(h) provides that the defenses of lack of personal jurisdiction. improper venue,

insufficiency or process or insufficiency of service of process are waived "if omitted from a motion...or if [they are] neither made my motion under this rule nor included in a responsive pleading..." Fed.R.Civ.P. 12(h).

Here, the Defendant raised the affirmative defense if insufficiency of service of process in his answer and his amended answer, specifically asserting that the Plaintiff's complaint should be dismissed pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure. The Defendant later filed a "motion for Summary Judgment," again raising the defense of insufficiency of service of process.2 The Court finds that the Plaintiff did not

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2 The Court notes that it would have been more correct for the Defendant to title his motion a "motion to dismiss of in the alternative for summary judgment," as his motion expressly includes a section seeking dismissal pursuant to Rules 12(b)(5) and/or (6)

Waive the issue of insufficiency of service of process, and thus, the Court finds the Plaintiff's objection to that effect without merit.

Next, the Defendant objects to the Magistrate Judge's failure to address the issue of subject matter jurisdiction. The Court finds this objection without merit: the Court clearly has subject matter jurisdiction to hear and adjudicate the Title VII claims, and the Magistrate Judge did not need to address the issue of subject matter jurisdiction.

Based on the foregoing, the Court agrees with the Magistrate Judge's recommendation that this action should be dismissed without prejudice for failure to timely and properly serve the Defendant. Nevertheless, in the event that such a dismissal is unwarranted, the Court will consider the merits of the Plaintiff's claims, addressing both the Magistrate Judge's recommendations and the Plaintiff's objections.

II. Whether the Defendant is entitled to summary judgment on the Plaintiff's claims?

In addressing the merits of the Plaintiff's claims, the Magistrate Judge first evaluated the Plaintiff's claim that the Defendant engaged in racial harassment and created a racially hostile work environment. The Magistrate Judge set forth the appropriate standard for addressing this claim and evaluated the Plaintiff's specific factual allegations, ultimately concluding that the Plaintiff's allegations failed to satisfy the requirement that the complained of conduct was sufficiently pervasive or severe to create an abusive working environment.

The Plaintiff objects to the Magistrate Judge's analysis of his hostile work environment claim, asserting that the Magistrate Judge engaged in piece-meal analysis as opposed to a holistic analysis of the factual allegations. The Plaintiff asserts that the

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Alleged facts prevent a pattern of racial

harassment and that whether the harassment was sufficiently severe or pervasive is "quintessentially a question of fact."

The Court has thoroughly reviewed the record, including the Magistrate Judge's R&R and the Plaintiff's objections, and finds that the R&R applies the correct principles of law and reflects the appropriate application of the facts to the law. This, viewing the facts in the light most favorable to the Plaintiff and examining the totality of the circumstances, including: (1) the frequency of the alleged discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating; or a mere offensive utterance; and (4) whether the conduct unreasonably interfered with the plaintiff's work performance, see Harris v. Forklift Sys., 510 U.S. 17, 17 (1993), the Court agrees with the Magistrate Judge that circumstances fall short of the type of severe or pervasive race-based activity necessary to state a hostile work environment claim. The Plaintiff's objection is therefore overruled.

Next, the Magistrate Judge evaluated the Plaintiff's claim that he was subject to racial discrimination in the form of disparate treatment and termination from employment. The Magistrate Judge determined that the Plaintiff met the first and third prongs of the prima facie case of racial discrimination because he is a member of a protected class and because he suffered an adverse employment action when the Defendant terminated his employment. In addition, the Defendant conceded that the Plaintiff met the third prong of the test because he was qualified for the job and his performance was satisfactory.

At this point, the burden shifted to the Defendant to produce legitimate, non-discriminatory reasons for the adverse employment action, which the Defendant did by

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Demonstrating that the Plaintiff's termination was due to his insubordination and not because of his race. Specifically, the

Defendant asserted that the Plaintiff failed to follow three direct orders from his superiors: (1) that he failed to speak to Jan Watts about his workers compensation claim; (2) that he failed to report back to his supervisors after speaking to Watts: and (3) that he failed to make an appointment to see a doctor. Because the Plaintiff could not demonstrate that the legitimate reasons produced by the Defendant were not its true reasons but were instead a pretext for discrimination, the Magistrate Judge recommended that the Court grant summary judgment on the Plaintiff second cause of action.

In his objections, the Plaintiff asserts that a genuine issue of material fact exists as to what orders that Plaintiff actually received. The Plaintiff concedes that he was given one order - to go see Jan Watts regarding his workers compensation claim - and he claims to have done so. With respect to the final two orders, however, the Plaintiff asserts that whether he received these orders is a fact in controversy.

After a review of the record, the Court disagrees with the Plaintiff's characterization of the record and finds the Plaintiff's objection to be without merit. The record shows that the Plaintiff admitted that he did not report to his supervisors that he was still experiencing pain, as he was required to do by BCSO's operating procedure. Moreover, in the parties' joint factual brief, the parties admit that Sergeant Wade ordered the Plaintiff to see a doctor immediately. The parties also agree that the Plaintiff told Sergeant Wade that he had not going to see a doctor because "I don't like doctors and I am procrastinating." The Court finds that the record as a whole could not lead a rational trier of fact to find for the Plaintiff on this claim, and therefore, disposition by summary judgment is appropriate. The

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Plaintiff's objection is overruled.

The Plaintiff next objects that the Magistrate Judge failed to address his claim that Sergeants Colandra and Slupski failed

the Plaintiff as a patrol officer because of his race rather than because of his performance. A review of the record reveals that the Plaintiff id not assert this claim in his amended complaint; nevertheless, even if he had done so, the Court finds that the claim is subject to summary dismissal. The Plaintiff admits, by way of the parties' joint factual brief, that the sergeants evaluated the Plaintiff's performance as substandard. Specifically, Calandra noted numerous weaknesses on the part of the Plaintiff, including his slow completion of incident reports, his poor radio procedures, and his driving ability. Following further field training, Slupski noted, inter alia, that the Plaintiff's field notes "leave a lot to desire"; that the Plaintiff's knowledge of South Carolina statutes, county codes, and BCSO policies is "far below acceptable standards"; that his radio procedures "as a whole are unsatisfactory"; and that the Plaintiff's "driving ability is far below the expected average member of the general public, let

alone a law enforcement officer." Overall. the evidence of record demonstrates that eh Defendant had legitimate, nondiscriminatory reasons for failing the Plaintiff as a patrol officer instead of assigning him to the courthouse security detail, and the Plaintiff has not met his burden of establishing that the Defendant's legitimate, nondiscriminatory reasons were merely a pretext for discrimination. The Plaintiff's objection is overruled.

Next, the Magistrate Judge evaluated the Plaintiff's claim that he was wrongfully terminated in retaliation for participating in protected acts of reporting racial discrimination and opposing discrimination. The Magistrate Judge set forth the standard for establishing a prima facie case of retaliation and concluded that eh Plaintiff failed to establish a prima

Facie case. Specifically, the record indicates that eh Plaintiff was transferred to courthouse duty at some point in July of 2003.

and the Plaintiff testified that shortly after his transfer, he told his supervisor at the courthouse, Mattox, of the alleged discrimination he faced while in training. The Plaintiff was not disciplined and terminated until December of 2004, more than a year after he had been assigned to courthouse duty and allegedly engaged in protected activity. In light of this lapse of time, as well as the circumstances surrounding the Plaintiff's disciplinary action, the Magistrate Judge concluded that the Plaintiff could not show that there was a causal connection between the protected activity and the disciplinary action.

The Plaintiff objects to this conclusion, asserting that there is evidence of a causal connection. Upon review, however, the Court finds the Plaintiff's objection without merit and agrees with the Magistrate Judge that the Plaintiff has failed to set forth facts sufficient to establish a causal connection between protected activity and the disciplinary action.

Lastly, the Magistrate Judge evaluated the Plaintiff's fourth claim: wrongful termination as a result of pursuing a claim for worker's compensation against BCSO. The Magistrate Judge quoted S.C. Code Ann 41-1-80, which provides that "[n]o employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation law." This section further provides that the "statute of limitations for actions under this section is one year." S.C. Code Ann. 41-1-80. Here, because the Plaintiff never properly served BCSO with the complaint or the amended complaint, the Magistrate Judge recommended dismissal of this cause of action.

The Defendant objects to the Magistrate Judge's recommendation, reasserting his

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Objection to the Magistrate Judge's finding

that the Plaintiff failed to properly serve the Defendant. As previously addressed in this order, the Court finds that the Plaintiff failed to properly serve the Defendant and that the complaint is subject to dismissal due to such failure. Moreover, the parties stipulated to the fact that on November 18, 2004, Lieutenant Mark Mattox and Sergeant Wade spoke to the Plaintiff about his medical problems and told him to contact Jan Watts, the Beaufort County Risk Manager, in connection with his workers compensation claim. After a review of the record, therefore, the Court finds that no genuine issue of material fact exists with respect to the Plaintiff's claim that he would not have been terminated but for his worker's compensation claim. Accordingly, the Court finds the Plaintiff's objection without merit and agrees with the Magistrate Judge's recommendation that eh Court should dismiss the Plaintiff's wrongful termination claim under S.C. Code Ann. 41-1-80.

CONCLUSION

Based on the foregoing, it is

ORDERED that the R&R is adopted and the Defendant's motion for Summary Judgment is granted.

IT IS SO ORDERED.

The Honorable Sol Blatt, Jr.
Senior United States District Judge

September 28, 2007
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CARLTON SHAW, Plaintiff,	)	
	)	C.A.No.9:05-v.-cv-03253-SB
BEAUFORT COUNTY SHERIFF'S OFFICE,	)	
Defendant.	)	REPORT AND

RECOMMENDATION

I. INTRODUCTION

The Plaintiff, Carlton Shaw ("Plaintiff" or "Shaw"), an African-American male, filed this action against his former employer, the Beaufort County Sheriff's Office (the "Defendant" or the "BCSO"), alleging causes of action against the Defendant for racial harassment, race discrimination (disparate treatment), and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42

U.S.C 2000e *et seq.*, and wrongful termination in violation of S.C. Code Ann. 41-1-80. Plaintiff request a jury trial, and seeks the award of actual, consequential, and compensatory damages, and all damages and equitable remedies made available by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* and S.C. Code 41-10-80, attorney's fees, and costs of action. [1]

This Court has original jurisdiction of this matter pursuant to 28 U.S.C 1331 and supplemental jurisdiction pursuant to 28 U.S.C. 1367. Venue is proper because the events at issue occurred in this District and Division. 28 U.S.C. 1391.

Pursuant to the provisions of 28 U.S.C. 636(b)(1)(B), and Local Rule 73.02(B)(2)(g), DS.C., this magistrate judge is authorized to review all pretrial maters in cases filed under 42 U.S.C. 2000e, *et seq.*, and submit findings and recommendations to the District Court.

II. PROCEDURAL HISTORY

On November 21, 2005, Plaintiff filed this

auction in the United States District Court for the District of South Carolina. [1} Before an answer was filed, the Plaintiff filed and Amended Complaint on March 8, 2006. The Defendant filed its answer on April 7, 2006, setting forth a general denial as to the claims set forth, and also alleging that the Plaintiff failed to properly serve the Summons and Complaint on Defendant. [6] Thereafter, the Defendant filed and Amended Answer, again alleging that Plaintiff failed to properly serve the Summons and Complaint on Defendant and also alleging various affirmative defenses such as the statute of limitations, and that Plaintiff had failed to exhaust his available administrative remedies with the United States Equal Employment Opportunity Commission (the "EEOC") and the South Carolina Human Affairs Commission. [11] On December 13. 2006. the Defendant filed its Motion for Summary Judgment. [22] Plaintiff filed his response in oppositions to the motion for summary judgment on January 16, 2007 [26], and the Defendant

filed its reply on January 25, 2007 [28-2]. Plaintiff then filed an Affidavit in opposition to the Defendant's Motion for summary judgment. [34] As the issues have been joined. this matter is ripe for review.

111. FACTS

A. Stipulated Facts

The Plaintiff and the Defendant have stipulated to the following facts, as set forth in their Joint Factual Brief, filed at the Order of the Court:

The Beaufort County Sheriff appointed Carlton Shaw a Deputy on February 3, 2003. The Plaintiff is and African American male. Policies and procedures, including the Affirmative Action Plan, are established in the BCSO Standard Operation Procedures. The Standard Operating Procedures, including the internal complaint procedures. are made known to all deputies during training procedures. The Plaintiff received a copy of the BCSO Standard Operation Procedures. The Plaintiff reviewed and familiarized himself with all BCSO policies

and procedures and at all times had access to the written policies and procedures.

The Plaintiff went to the South Carolina Police Academy on February 23. 2003. Upon his return from a successful completion of training at the Academy, the Sheriff, assigned the Plaintiff to seven days of field training under the supervision of Corporal Hall. At the end of this training, Cpl. Hall issued a report citing the Plaintiff on several weak areas. BCSO Major Darrell Butler reviewed this report and recommended and additional seven days of field training under a different officer.

The Plaintiff then began training under BCSO Sergeant Tim Slupski on May 14, 2003. At the end of this training, Sergeant Slupski evaluated the Plaintiff's performance as substandard and recommended that he be terminated, retrained or assigned to another unit which did not include patrol. The Plaintiff reviewed the written evaluation prior to its completion and submission. Rather than termination the Plaintiff, BCSO

assigned him to the c arthouse security detail. After reassignment to the courthouse included scanning patrons at the front entrance, patrolling the courthouse, courthouse security and transporting a mobile file cabinet from the Sheriff's office to the courthouse.

On June 12, 2003, the Plaintiff received a substandard performance evaluation in shotgun training. From July 2003 to November 2003, the Plaintiff received seven performance evaluation that revealed he still needed improvement in his driving abilities.

On November 15, 2003, BCSO Captain Richard Roper released Plaintiff from training and approved him for duty.

The Defendant's employees on the job called the Plaintiff "Bo" on several occasions.

On March 29, 2004, the Plaintiff stopped at a traffic light while on duty in a county vehicle and was rear-ended by another driver.

Initially the Plaintiff want to a Doctor's Care, a temporary treatment office, but during his tenure with BCSO, he did not seek follow-up

treatment from his primary physician. On November 18, 2004, the Plaintiff told one of his supervisors, Sergeant Jacqueline Wade, that he was still having medical problems from the motor vehicle accident.

Also on November 18, 2004, Lieutenant Mark Mattox and Sergeant Wade spoke to the Plaintiff about his medical problems and told him to contact (Mr.) Jan Watts, the Beaufort County Risk Manager. The Plaintiff never reported back to either Sergeant Wade or Lieutenant Mattox with a status report. On December 9,2004, the Plaintiff told Sergeant Wade that he had not gone to the doctor because, "I don't like doctors and I am procrastination." Also on December 9, 2004, Sergeant Wade ordered Shaw to see a doctors immediately. On December 10, 2004, Sergeant Wade recommended that BCSO terminate the Plaintiff for insubordination. Lieutenant Mattox reviewed the situation and recommended the Plaintiff's termination to his superior, Captain Roper.

On December 13, 2004, Sergeant Wade,

Lieutenant Mattox. Major Butler, Lieutenant Colonel David Brown and Chief Deputy Michael Hatfield met with the Plaintiff to discuss potential termination; they gave the Plaintiff an opportunity to review all the recommendation and memos prepared by his superiors as well as ask questions and discuss the reason for termination. During the meeting in Chief Deputy Hatfield's office, the Plaintiff denied that his superiors ordered him to seek medical attention and refused to sign and date the disciplinary form.

The EEOC issued a Right to Sue letter on August 31, 2005.

The Plaintiff filed a complaint in the Beaufort Division of the U.S. District Court on November 21, 2005, and an Amended complaint on March 24, 2006. The Plaintiff sent the Complaint to the Defendant by certified mail. The Plaintiff did not personally server the Sheriff or his clerk.

B. The Plaintiff's Statement of Facts in Controversy

The Plaintiff has set forth the following

Statement of Facts beloved to be in controversy, and the undersigned has set forth the defendant's corresponding responses to those facts.

A Stipulated Facts

The parties have stipulated to the following facts, as set forth in their joint factual brief:

1. The Beaufort County Sheriff appointed Carlton Shaw a deputy on February 3, 2003.

2. The Plaintiff is an African American Male.

3. Policies and procedures, including the Affirmative action plan, are established in the BCSO Standard Operating Procedures, including the internal complaint procedures, are made known to all deputies during training procedures.

5. The Plaintiff went to South Carolina Police Academy on February 23, 2003.

6. Upon his return from a successful completion of training at the academy, the Sheriff assigned the Plaintiff to seven days of field training under the supervision of

Corporal Hall.

7. At the end of his training, Cpl. Hall issued a report citing the Plaintiff on several weak areas.

8. BCSO Major Darrell Butler reviewed this report and recommended an additional seven days of field training under BCSO sergeant Tim Slupski on May 14, 2003.

10. At the end of this training, Sergeant Slupski evaluated the Plaintiff's performance as substandard and recommended that he be terminated, retrained or assigned to another unit which did not include patrol.

11. The Plaintiff reviewed the written evaluation prior to its completion and submission.

12. Rather than terminating the Plaintiff, BCSO assigned him to the courthouse security detail.

13. After reassignment to the Courthouse, BCSO gave the Plaintiff additional training.

14. The Plaintiff's duties at the courthouse included scanning patrons at the front entrance, patrolling the courthouse.

courtroom security and transporting a mobile file cabinet from the Sheriff's office to the courthouse.

15. On June 12, 2003, the Plaintiff received a substandard performance evaluation in shotgun training.

16. From July 2003 to November 2003, the Plaintiff received seven performance evaluations that revealed he still needed improvement in his driving abilities.

17. On November 15, 2003, BCSO Captain Richard Roper released Plaintiff from raining and approved him for duty.

18. On March 29, 2004, the Plaintiff stopped at a traffic light while on duty in a county vehicle and was rear-ended by another driver.

19. The Plaintiff received a copy of the BCSO Standard Operating Procedure.

20. The Plaintiff reviewed and familiarized himself with all BCSO policies and procedures and at all times had access to the written policies and procedures.

21. The Defendant's employees on the job

called the Plaintiff "Bo" on several occasions.

22. Initially the Plaintiff when to Doctor's Care, a temporary treatment office, but during his tenure with BCSO, he did not seek follow-up treatment from his primary physician.

23. On November 18, 2004, the Plaintiff told one of his supervisors, Sergeant Jacqueline Wade, that he was still having medical problems from the motor vehicle accident.

24. On November 18, 2004, Lieutenant Mark Mattox and sergeant Wade spoke to the Plaintiff about his medical problems and told him to contact Jan Watts, the Beaufort County Risk Manager.

25. Shaw never reported back to either Sergeant Wade or Lieutenant Mattox with a status report.

26. On December 9, 2004, the Plaintiff told Sergeant Wade that he had not gone to the doctor because, "I don't like doctors and I am procrastinating."

27. On December 9, 2004, Sergeant Wade

ordered Shaw to see a doctor immediately.

28. On December 10, 22004, Sergeant Wade recommended that BCSO terminate the Plaintiff for insubordination.

29. Lieutenant Mattox reviewed the situation and recommended the Plaintiff's termination to his superior, Captain Roper.

30. On December 13. 2004, Sergeant Wade, Lieutenant Mattox, Major Butler, Lieutenant Colonel David Brown and Chief deputy Michael Hatfield met with the Plaintiff to discuss potential termination. they gave the Plaintiff an opportunity to review all the recommendations and memos prepared by his superiors as well as ask questions and discuss the reason for his termination.

31. During the meeting in Chief Deputy Hatfield's office, the Plaintiff denied that his superiors ordered him to seek medical attention and refused to sign and date the disciplinary form.

32. The EEOC sent a Right to Sue letter on August 31, 2005.

33. The Plaintiff filed a complaint in the

Beaufort Division of the U.S. District Court on November 21, 2005, and an Amended Complaint on March 24, 2006.

34. The Plaintiff sent the Complaint to the Defendant by certified mail.

35. The Plaintiff did not personally serve the Sheriff or his clerk.

(Joint factual Brief at 1-4)

B. The Plaintiff's Statement of Disputed Facts and the Defendant's Response.

1 In addition to the stipulated facts set forth above, the Plaintiff provided a list of facts that he contends are in dispute, and the Defendant responded to the Plaintiff's list. The Court has included the Defendant's corresponding response below each of the Plaintiff's disputed facts.

Plaintiff's Disputed Fact #1: Plaintiff retired from the NYPD in 2002, and accompanied his wife to South Carolina. She was stationed in Beaufort as a permanently activated Reserve Naval Officer. (Shaw Affidavit 7-10)

Defendant's Response:

The fact that the Plaintiff left the NYPD in

2002 is not in controversy; however, this fact is irrelevant, as is any reference to his wife or his duty station.

Plaintiff's Disputed Fact # 2:

The Plaintiff successfully completed training at the academy, before being assigned to field training under the supervision of Corporal Hall.

Defendant's Response:

These facts are not in controversy; however, for clarification, the Plaintiff was first assigned to Field Training with Officer Rodriguez, then Officer Hall, then Sgt. Slupski, and finally, office Norberg.

Plaintiff's undisputed Fact # 3:

Based on his experience with the NYPD, Plaintiff qualified to be a corporal. However, this rank was kept in abeyance pending his completion of training under another officer.

Defendant's Response:

These facts are in controversy because the Plaintiff would not qualify to be a corporal until he successfully passed field training. Plaintiff did not complete his initial training

and had difficulty throughout his orientation and field training. His trainers finally cleared him from training and assigned him to the courthouse where he was given the rank and pay of a corporal.

Plaintiff's Disputed Fact # 4:

Hall was Plaintiff's supervisor and trained the Plaintiff for seven (7) shift days.

Defendant's Response:

These facts are not in controversy.

Plaintiff's Disputed Fact # 5:

Cpl. Hall told Plaintiff to destroy a valid Summons. (Shaw Affidavit 17)

Defendant's Response:

This fact is in controversy and is irrelevant to the lawsuit. Cpl Hall could not destroy a summons which is a numbered citation for which the deputy is accountable. Cpl. Hall ordered destruction of a written notice, a computer generated slip used to notify personal of court dates, roll call, etc.

Plaintiff's Disputed Fact #6:

Hall ordered Shaw to engage in dangerous pursuits of subjects who had engaged in very

minor violations. even going so far as to tell Shaw to drive head on towards a dune buggy. (Shaw Affidavit 18-19)

Defendant's Response:

These facts are in controversy and are irrelevant to the lawsuit. Hall ordered Shaw on one occasion to pursue a fleeing individual driving a stolen ATV. Hall ordered pursuit, not a head on collision course.

Plaintiff's Disputed Fact # 7: Cpl Hall ordered Plaintiff to throw a bong (drug paraphernalia), into the ocean. Shaw kept it and attempted to have it tested as evidence against the perpetrator. His request was denied. (Shaw Affidavit 22)

Defendant's Response:

This fact is in controversy and is irrelevant to the case.

Plaintiff's Disputed Fact # 8:

At the end of this training. Cpl. Hall issued a report citing several weak areas. mainly on those areas where Plaintiff had found Hall decisions to be dangerous, like driving. On the other hand. Cpl. Hall did make several very

positive comments about Shaw's abilities. Major Butler reviewed this report and recommended an additional seven (7) days of field training under a different officer.

Defendant's Response:

The fact that Cpl. Hall did make positive comments in those areas that he found the Plaintiff merited the comment is not in controversy; however, Hall's evaluation of the Plaintiff revealed weaknesses in his knowledge of SC

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Statutes and laws, poor report writing, poor radio protocol, no sense of urgency when responding to calls, and questionable driving abilities. (See Exhibit 2 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 9

The Plaintiff then began training under Sgt. Slupski on May 14, 2003. In Slupski praised the Plaintiff for his relations with the public and the good judgment plaintiff exhibited on some calls.

Defendant's Response:

The fact that Sgt. Slupski attempted to praise Shaw where warranted and tried to give Shaw a clean slate to assist him in a fresh approach to training is not in controversy. (See Exhibit 2 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 10:

During the early part of the training, Sgt. Slupski, while in the vehicle with Shaw, asked Shaw, do you think I'm racist? He then went on to warn Shaw hat he might hear Slupski tell a race or watermelon joke to his wife on occasion, and that Slupski did not believe in that whole slavery thing. (Shaw Affidavit 63-64)

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 11:

Thereafter, Slupski began to refer to Plaintiff as "Bo" almost constantly. (Shaw Affidavit 65).

Defendant's Response:

The fact that Sgt. Slupski referred to Plaintiff

as "Bo" is not in controversy. However, for clarification, Sgt. Slupski only occasionally referred to the plaintiff using the term "Bo" as a non-racist, general term used by many persons in the low country as a friendly greeting.

Plaintiff's Disputed Fact # 12

On one occasion, when Slupski was angry with Plaintiff and was preparing To have him go off shift, he called the Plaintiff "boy." (Shaw Affidavit 67) Shaw recognized "boy" when used in anger by a white man against an African American man to be a racist slur.

Defendant's response:

These facts are in controversy.

Plaintiff's Disputed Fact # 13

Plaintiff observed that Slupski and another Sergeant, Calandra, used the term "bo" towards African American men exclusively.

Defendant's Response:

This fact is in controversy.

Plaintiff's Disputed Fact # 14

Plaintiff asked other African American

officers and supervisors if bo and boy were synonymous. They told him that they were. (Shaw Affidavit 69)

Defendant's Response

The fact is in controversy.

Plaintiff's Disputed Fact # 15

Specifically, Sgt Harris told Plaintiff that he interpreted bo to be short for boy and a racial slur towards African Americans. (Affidavit of Harris)

Defendant's Response:

Sgt. Harris submitted an affidavit which speaks for itself.

Plaintiff's disputed Fact # 16

Calandra, one of Plaintiff's training Supervisors, who may have believed that Plaintiff was partly of Latino descent, called him Rico Suave after a Latino singer, and asked him if he spoke Spanish. (Shaw Affidavit 70).

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 17:

Calandra also would mimic a voice and accent

which he told Shaw was a parody of what he referred to as an uppity black person (Shaw Affidavit 71).

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 18:

After being assigned to the Courthouse, Plaintiff was given further training while at the courthouse. From July 2003 to November 2003, the Plaintiff received seven (7) performance evaluations while he was assigned to Court House detail. The evaluations reveal the Plaintiff performed his courthouse duties well and in a professional manner.

Defendant's Response:

The fact that Plaintiff received 7 evaluations while he was assigned to the courthouse is not in controversy; however, for clarification, not all of the evaluations reflect Plaintiff performed well and professionally. (See Exhibit 3 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact #19

Sgt. Harris, Plaintiff direct supervisor, evaluated the Plaintiff as performing his duties well at the Courthouse. (Harris Affidavit)

Defendant's Response:

Sgt. Harris submitted an affidavit which speaks for itself.

Plaintiff's Disputed Fact # 20:

Corporal Fyfe (white officer) was Plaintiff's training supervisor for driving at one point. In one evaluation written on September 12, 2003, by Cpl. Fyfe, it was noted that the Plaintiff admitted to having night vision problems as a possible response for his poor driving performance. This came on the heels of a night driving incident. Cpl. Fyfe told Plaintiff not to worry because all African Americans had trouble seeing in the dark. (Shaw Affidavit 73).

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 21:

On November 15, 2003, Capt. Roper released Plaintiff from training and approved him for

duty.

Defendant's Response:

The fact that Captain Roper released Plaintiff from training an approved him for duty is not in controversy; however, for clarification. Plaintiff was released for courthouse security duty, not for road patrol. (See Exhibit 2 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 22:

On March 29, 2004, the Plaintiff was stopped at a traffic light, while on duty in a county vehicle, when he was rear ended by another driver. He sought treatment the same day at Doctor's Care under worker's compensation coverage. Plaintiff went to the Doctor's care under worker's compensation coverage. Plaintiff went to Doctor's care one time on March 29, 2004. He was observed and discharged. (Shaw Affidavit 93)

Defendant's Response

These facts are in controversy.

Plaintiff's Disputed Fact # 23:

While on duty at the courthouse, Shaw met

with Lt. Mattox, a new supervisor, in late September, or early October of 2004. Shaw explained his concerns about the race discrimination and harassment he felt he had been subjected to while in his training phases. Lt. Mattox listened to the complaints. (Shaw Affidavit 79)

Defendant's Response:

These facts are not in controversy.

Plaintiff's Disputed Fact # 24:

In November of 2004, the Plaintiff's pain in his neck and back reestablished. Plaintiff decided he had a more serious injury and mentioned it to Sgt. Wade.

Defendant's Response:

The fact that the Plaintiff mentioned his back was still hurting from the accident is not in controversy; however, for clarification, Sgt. Wade told Plaintiff to see a doctor and take care of the injury. The Plaintiff did not follow her order to seek medical treatment. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 25

On November 18, 2004, Lt. Mattox and Sgt. Wade spoke to the Plaintiff about his medical problems and told him to contact Jan Watts, the Beaufort County Risk Manager. (Shaw Affidavit 44)

Defendant's Response:

The fact that Lt. Mattox and Sgt. Wade spoke to the Plaintiff about his medical problems is not in controversy; however, for clarification, both Sgt. Wade and Lt. Mattox ordered the plaintiff to see a doctor and take care of the injury and to pursue his worker's compensation claim. The Plaintiff did not follow these directives. (See Exhibit 8 to Defendant's Memorandum in support of Summary Judgment.)

Plaintiff's Disputed Fact # 26

At the November 18, 2004 meeting, Shaw again told Mattox that he felt like he had been treated unfairly during his training because of his race, and mentioned being subjected to racist comments by his training supervisors. (Shaw Affidavit 80)

Defendant's Response

These facts are in controversy.

Plaintiff's Disputed Fact # 27

As instructed, Plaintiff contacted Jan Watts to request that he be evaluated for further treatment. It was at this time that Plaintiff was informed by Jan Watts that his workers compensation claim had expired and that Plaintiff would have to seek medical treatment and a resolution of his claim through the private sector (pay for his own medical treatment and sue the other driver privately to seek compensation for his medical bills.) (Shaw Affidavit 54-56; Exhibit #2 to Plaintiff response to Summary Judgment, a letter from Jan K . Watts.)

Defendant's Response:

The fact that the Plaintiff was told by Jan Watts that his claim had expired and that his claim had expired is not in controversy; however, for clarification. the plaintiff never followed up on medical treatment and therefore the time to pursue his claim expired. (See Exhibit 8 to Defendant's Memorandum in Support of Summary

Judgment).

Plaintiff's Disputed Fact # 28

A week or so after his meeting with Lt. Mattox and Sgt. Wade, Plaintiff was working in the Courthouse when Sgt. Wade asked Plaintiff to move the file cabinet. He made the attempt, and felt a sharp pain in his back. He said "Ouch! I hurt myself!" Sgt. Massey was present and observed this. Plaintiff notified her that he had hurt his back. He took several Advil and worked out the rest of the day after reporting the incident to Katrina Polite. (Shaw Affidavit 49).

Defendant's Response:

These facts are in controversy because Sgt. Massey was never employed by the Defendant and is an employee of the Port Royal Police department. In addition, Katrina Polite was never in a supervisory position over the Plaintiff thus any report the Plaintiff made to Katrina Polite of his injury would not be in accordance with Defendant's chain of command protocol.

Plaintiff's Disputed Fact # 29

On December 9, about a week one (1) later, Sgt. Wade called Plaintiff to her desk, and then told him to never mind she was going to ask him to move the cabinet again, but had decided to ask Sgt. Fanger to handle it instead, as Shaw had reminded her that his back was still hurting. (Shaw Affidavit 51)

Defendant's Response

These facts are not in controversy.

Plaintiff Disputed Fact # 30

The next day, Sgt. Wade asked Sgt. Fanger to handle moving the cabinet. Shaw was present and ready to help, but Sgt. Fanger told him to wait until they got another officer to help them. While they were waiting, Capt. Roper called them into his office and demanded to know whether Shaw had been asked to move the cabinet and whether he had refused to do it. Capt. Roper asked several questions about Shaw's medical condition, accused Shaw of never having contacted Watts at all (Wade claims to have been aware, at this point that Shaw did contact Watts and was denied coverage for treatment, although she did not

speak up in Shaw's defense). Roper suspended Plaintiff on the spot, but did not punish Fanger. (Shaw Affidavit 55-57)

Defendant's Response:

These facts are in controversy.

Plaintiff's Disputed Fact # 31

On December 10, 2004, Lt. Mattox recommended that Shaw be terminated, as did Sgt. Wade, who now claimed that she had ordered Shaw to report to her on what Watts had told him. Wade also claimed that Watts had instructed the Plaintiff to get further medical attention from a private physician in order to be evaluated for workers comp. treatment.

Defendant's Response:

The fact that Lt. Mattox and Sgt. Wade recommended Shaw's termination is not in controversy. however, for clarification both recommendations were for insubordination. failing to get medical attention. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment.)

Plaintiff's Disputed Fact # 32

On December 13, 2004, Lt. Col. David Brown also recommended termination of the Plaintiff. The Plaintiff was terminated on December 13, 2004, allegedly for insubordination.

Defendant's Response

This fact is not in controversy

Plaintiff's Disputed Fact # 33

At the time that the Plaintiff was terminated, the insubordination that Defendant claimed Plaintiff had committed was allegedly refusing to follow up with Jan K. Watts or not cooperating with Mr. Watts office in order to get workers compensation treatment for his injuries.

Defendant's Response:

These facts are not in controversy; however, for clarification. Plaintiff was insubordinate in not following through on his worker's compensation claim and medical treatment even though he was still injured from the accident. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment).

Plaintiff's Disputed Fact # 34

After his termination, Plaintiff contacted Mr. Watts and Mr. Watts wrote Plaintiff a letter, explaining that Mr. Shaw had contacted him when Shaw said he did, that Mr. Watts had told Shaw that there was no workers' compensation coverage, and that Shaw would have to pursue any treatment at his own expense, and, finally, that Mr. Shaw had not failed to comply or cooperate with Mr. Watts' department. This letter is attached as Exhibit #2 to the Plaintiff Response to Summary Judgment.

Defendant's Response:

These facts are not in controversy; however, for clarification, there was no longer worker's compensation coverage because the Plaintiff allowed the claim to expire by not following up with medical treatment needed for his full recovery. (See Exhibit 8 to Defendant's Memorandum in Support of Summary Judgment.)

IV. SUMMARY JUDGMENT STANDARD

Courts take special care when considering

summary judgment in employment discrimination cases because estates of mind and motives are often crucial issues. Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir), cert denied, 484 U.S. 897 (1987). This does not mean that summary judgment is never appropriate in these cases. To the contrary, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id. Quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).* "Genuineness means that the evidence must create fair doubt; wholly speculative assertion s will not suffice." Ross v. *Communications Satellite Corp.*, 759 F. 2d 355, 364 (4th Cir. 1985).

The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). The Defendants, as the moving parties, bear

the initial burden of pointing to the absence of a genuine issue of material fact. *Temkin v. Frederick County Comm'rs*, 945 F. 2d 716, 718 (4th Cir. 1991), *citing Celotex Corp. v. Catrett.*, 477 U.S. 317, 322 (1986). If the Defendants carry this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a friable issue of fact." *Id*, at 718-719, citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986). "[O]nce the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is genuine issue for trial." Standard of proof that would apply at a trial on the merits." Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) and DeLeon v. St. Joseph Hospital, Inc., 871 F.2d 1229, 1233 n.7 (4th Cir. 1989). Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. Evans v. Technologies Applications & Servs.Co., 80 F.3d 954 (4th Cir. 1996). In addition, a party

"cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."Beale v. Hardy. 769 F>2d 213, 214 (4th Cir. 1985). Therefore. "[m]ere unsupported speculation... is not enough to defeat a summary judgment motion." Ennis v. National Ass'n of Bus. & Educ.Radio, Inc., 53 F.3d 55, 62 (4th Cir. 1995).

V. ANALYSIS

A. Whether Plaintiff Timely Effected Service

The Defendant asserted as an affirmative defense in its Answer. Amended Answer, and memorandum in support of its motion for summary judgment that the Plaintiff failed to timely serve the Summons and Complaint upon it, and thus the Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(5) and/or 12(b)(6).1

1.Filing

Title 42. U.S.C. 2000e-5(f)(1), provides that a person who received a "right to sue" notice from the United States Equal Employment Opportunity Commission

("EEOC") must file any civil action against the respondent named in the charge in either state or federal court within 90 days after the giving of such notice. The Fourth Circuit strictly adheres to the 90-day rule. See Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993) (a lawsuit

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1 See Defendant's Memorandum [22-2] at p. 7

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Commenced 95 days after plaintiff received her right to sue letter from the EEOC was barred by the 90 day rule); Harvey v. City of New Bern Police Dept., 813 F.2d 652 (4th Cir. 1987) (plaintiff's claim under Title VII was barred where his lawsuit was commenced 91 days after he received a right to sue letter from the EEOC); Dixon v. Digital Equipment Corp., 976 F.2d 725 (4th Cir. 1992) (Table) (Fourth circuit affirmed the district court's grant of summary judgment to the defendant because pro se plaintiff filed on the 91st day after receiving the right to sue letter).

In the present case, the EEOC

Dismissal and Right to Sue letter was dated August 31, 2005, and Plaintiff timely filed his complaint on November 21, 2005, which by this court's count is 83 days after the date of the Notice of Right to Sue.

2. Service

Although the Plaintiff filed the Complaint on November 21, 2005, the Plaintiff failed to serve the Complaint on the Defendant in the manner required by the Federal Rules of Civil Procedure. Rule 4(j)(2) requires:

Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the Summons and Complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that sate for the service of summons or other like process upon any such Defendant.

The Federal Rule requires a party to serve a state governmental organization subject to suit shall be effected by delivering a copy of

the summons and the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

The Federal Rules require a party to serve a state governmental entity pursuant to the state rules. In South Carolina, sheriffs are state officials. Gulledge v. Smart, 691 F.Supp. 947, 954-955 (D.S.C. 1988); Cone v. Nettles, 308 S.C. 109, 112 (1992). The South Carolina Rules of Civil Procedure require that a state official be served in the following manner:

Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the attorney general at Columbia.

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S.C.R.C.P. Rule 4(d)(5). The Plaintiff's attorney, however, mailed the Summons and Complaint to the Defendant via certified

mail,2 which was not proper service.

Under some circumstances (which are not present here), failure to effect service is curable. Nevertheless, because the Defendant has never been served with process it is now entitled to dismissal under Rule 4(m) of the Federal Rules of Civil Procedure, which allows a Plaintiff 120 days "after the filing of the complaint" to serve the defendant with the summons and complaint. Pursuant to Rule 4(m):

If service of the summons and complaint is not made upon a defendant within one hundred and twenty (12) days after the filing of the complaint, the Court upon motion. or on its own initiative after notice to the Plaintiff. shall dismiss the action without prejudice as to that Defendant... provided that if the Plaintiff shows good cause for the failure, the Court shall extend the time for service for an appropriate period.

Fed.R.Civ.P. 4(m)

Here, the time for service began to run on the date of filing the complaint (November

21, 2005), and the one hundred twenty (120) day period for service provided by Rule ended on March 21, 2006. The Plaintiff failed to serve the Defendant within 120 days of filing the initial complaint, and then never properly served the Defendants with his amended complaint. The Plaintiff has been on notice since April 2006 that the complaint was never properly served but the Plaintiff never effected proper service.

Although a district court has the authority to extend the time for service for an appropriate period after the Plaintiff has established a good cause for failing to serve the Defendant, the Plaintiff has not requested that the court grant it an extension of time to effect service, and it has not set forth any good cause for failing to serve the Defendant as required by

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2 See Defendant's Exhibit 10, attached to Defendant's Memorandum [22-2]

The Rule. Over one year has elapsed since the

EEOC issued its notice of rights letter, but the Defendant has yet to be served properly. In Anderson v. City of Rock Hill, 2005 WL 3968035 at *2 (D.S.C. 2005), the pro se Plaintiff argued that he had "good cause" for not serving the Defendants because he was looking for work, could not afford the fees associated with the service by the sheriff, and was busy pursuing a state cause of action. Judge Currie held that the Plaintiff's complaint would be dismissed without prejudice. Id. The Court observed that generally, a dismissal without prejudice would mean that Plaintiff would be able to refile his case and thereafter properly effect service within the 120-day period. In Anderson, however, the district court noted that while the action would be dismissed without prejudice, Plaintiff's statute of limitations period for filing a suit under Title VII had expired, and noted that "[w]ithout prejudice' does not mean 'without consequence'." Anderson, 2005 WL 3968035 at *2, quoting Powell v. Starwalt, 866 F.2d

964, 966 (7th Cir. 1989).

In Anderson, the pro se plaintiff failed to set forth "good cause" which would allow the district court to extend the time for service. In this case, the Plaintiff first argues that because the initial complaint was served within ninety days of the EEOC's letter, this action has been timely commenced.3 Plaintiff contends that Rule 15, which permits that a party may amend that party's pleading once as a matter of course at any time before a responsive pleading is served, can be construed to allow the Plaintiff to have commenced this action within fewer than 90 days of the receipt of the Right to Sue letter. Plaintiff argues that because the Amended Complaint relates back to the date of the original Complaint pursuant to Rule 15(b), and the original complaint was filed within 90 days of the receipt of the right to sue letter, the filing is timely. In support of this

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3 See Plaintiff's Response [26] at p. 7

Argument, plaintiff relies on Pardazi v. Cullman Medical Center, 896 F.2d 1313 (11 Cir. 1990). which held that a Title VII action does not require service of process for subject matter jurisdiction. The Pardazi court held that because the Defendant had failing to raise the issue of whether service was untimely, the defendant had waived any right to challenge the sufficiency of service on summary judgment. The court is not persuaded by this argument, however, because the Defendant has consistently claimed that it was not properly served.

Although the Plaintiff contends that the "Defendant waived sufficiency of service by filing an Answer and failing to raise sufficiency of service of process as a pre-answer motion to dismiss."4 the court disagrees. As the record reflects, the Defendant preserved the affirmative defense by asserting it in both its answer and its answer to the amended complaint. In addition, Pardazi is inapplicable to the instant case because the Defendant in this

case has raised the issue of insufficient service. The Plaintiff has been on notice of the defense since April 2006, but despite this notice, the Plaintiff has done nothing to effect service. Thus, it is recommended that this case be dismissed without prejudice for failure to effect service on the Defendant within the time period prescribed by the Federal Rules. See Anderson.

Although it is recommended that this action be dismissed because the Plaintiff failed to properly serve the Defendant, the court will address Plaintiff's claims on their merits. Each of Plaintiff's causes of action against the Defendant will be discussed below.

B. First cause of action: a Racially hostile work environment under Title VII

Under Title VII of the Civil Rights Act of 1994, it is "an unlawful employment practice for an employer... to discriminate against any individual with respect to his compensation.

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4 See Plaintiff's response [26] at p.9.

Terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).

Plaintiff alleges that the defendant engaged in racial harassment and created a hostile work environment. To establish a prima facie case for hostile environment racial harassment, the plaintiff must show (1) that the conduct in question was unwelcome, (2) that the harassment was based on his race, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis exists for imputing liability to the employer. Norris v. City of Anderson, 125 F.Supp.2d 759, 765 (D.S.C. 2000), citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); Hartsell v. Duplex Prod., Inc., 123 F.3d 766, 773 (4th Cir. 1997); Swentek v. USAIR, Inc., 830F.2d 552, 557 (4th Cir. 1987). If the plaintiff meets this initial burden, then the

employer may still prevail if it proves that either the events did not take place, they were isolated or genuinely trivial, the employer took prompt remedial action reasonably calculated to end the harassment, or the employer was unaware of the harassment. Norris, 125 F.Supp.2d at 765, citing Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) and Dwyer v. Smith, 867 F.2d 184, 187 (4th Cir. 1989).

Plaintiff bases his racially hostile work environment and racial discrimination claims on the following statements:

1. Plaintiff states that Sgt. Slupski called him "boy" on one occasion when Sgt. Slupski was angry with him and sent him home for the day. (Shaw Affidavit 68)

2. Plaintiff described a conversation in which Slupski asked Plaintiff if Plaintiff thought Slupski was a racist, and then went on to say that Shaw might observe Slupski making a race or watermelon joke with Slupski's wife, but that Slupski did not believe in that whole slavery ting. (Shaw

Affidavit 63)

3. Plaintiff testified that Calandra called Plaintiff "Rico Suave" and asked him if he spoke Spanish, references to Calandra thinking Plaintiff had Mexican or Latino heritage. (Shaw Affidavit 70).

4. Plaintiff testified that Calandra, on occasion, had mimicked a voice and accent with Calandra

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Said were supposed to portray an uppity black person. (Shaw Affidavit 71)

5. Plaintiff testified that he was referred to constantly as "bo" a term he interpreted as short for "boy" a known racial epithet against African American men. (Shaw Affidavit 65-69)

Thereby making the Defendant aware of the conduct, and relied on Farragher v. Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2282, 141 L.Ed2d 662 (1998), citing Harris, 510 U.S. at 21, 114 S.Ct. 367. As Norris teaches, "[n]to all workplace conduct that may be described as 'harassment' affects a 'term.

condition, or privilege" of employment within the meaning of Title VII. Norris, 125 F.Supp.at 765, citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed2d 49 (1986). To prove a hostile environment claim, a plaintiff must be able to show more than a mere utterance of an epithet which engenders offensive feelings in an employee, as this does not sufficiently affect conditions of employment to constitute actionable harassment. Harris, 510 U.S. at 21, 114 S.Ct. 367. "An isolated racial remark, even though offensive and entirely appropriate, does not establish an abusive working environment." Williams v. Prince Georges County Hosp. Ctr., 932 F.Supp. 687, 689 (D.Md. 1996), aff'd, 103 F.3d 122 (4th Cir.

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5 See Plaintiff's Response [26] at p. 11

1996); see also Snell v. Suffolk County, 782 F.2d 109, 1103 (2nd Cir. 1986). "Title VII is not a federal guarantee of refinement and sophistication in the workplace[.]" Hartsell v.

Duplex Prod., Inc., 123 F.3d 766, 773 (4th Cir. 1997). In Farragher, the Supreme Court held that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in terms or conditions of employment." 118 S.Ct. at 2283.

Under the Farragher analysis, the work environment "must be both objectively and subjectively offensive." Plaintiff contends that his work environment was subjectively offensive because he understood the term "bo" meant "boy." With respect to whether the work environment was objectively offensive, Plaintiff argues that "the objective person cannot know what bo means, observes that it is only used towards black men by white men, and the person must have been told by his supervisors and other officers, upon asking, that bo is short for boy and it is a racially derogatory term."6

In response, Defendant claims "the word 'Bo' is a southern term for buddy that is commonly used throughout BCSO to address

fellow deputies in a general manner regardless of rank. race or national origin."7 Plaintiff claims there is a genuine issue of material fact "as to whether the constant use of the term, in addition to the other comments which were clearly racial in nature, could be sufficient to create a racially hostile work environment."8

Putting aside for a moment Slupski's use of the term "boy", the parties disagree about the

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6 Plaintiff's Response [26] at p. 12 in his deposition, Plaintiff testified he only remembered African Americans and Hispanics being called "bo". See Plaintiff's Deposition, attached to Defendant's Memorandum as Exhibit ^, at page 51. lines 16-24 and page 52, lines 1-6.

7 Defendant's Memorandum [22-2] at p. 10

8 Plaintiff's response [26] at p. 12

Meaning of the term "bo". The undersigned is mindful that the mere existence of some

alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-48, 106 S.Ct. 2505. 91 L.Ed.2d 202 (1986) (emphasis in original). Taking the evidence in the light most favorable to the Plaintiff as the non-moving party, Plaintiff has not set forth a prima facie case of a racially hostile work environment in violation of Title VII; even assuming, without deciding. that Plaintiff could established that the (1) harassment was unwelcome, and (2) based on race, he cannot satisfy the third prong of the test. because the Plaintiff has not shown that the use of the word "bo" was (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive environment. Whether an environment is hostile or abusive depends on factors such as "there frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating. or

a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.E.2d 295 (1993). There is no evidence that the use of the word "Bo" when referring to Plaintiff constitutes such a severe or pervasive harassment as to alter the conditions of employment, or create an abusive environment. At most, the use of the word was a "mere offensive utterance." See Harris. With respect to the word "bo" the court is of the opinion that while it was offensive to the Plaintiff, the use of the word does not amount to conduct that is severe enough to create an objectively hostile or abusive work environment. The Court is mindful that "Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399

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Next, Plaintiff claims that Slupski called him

"boy" one time. The use of this word towards Plaintiff is reprehensible, but it also was an isolated incident, and therefore it cannot be said that it permeated Plaintiff's work environment with discriminatory insult and abuse. See, e.g. Belton v. City of Charlotte, 175 Fed.Appx. 641, 657-58 (4th Cir. 2006) per curiam (holding that the plaintiff hearing the use of the word "nigger" one time, some twenty years earlier, did not permeate plaintiff's work environment with discriminatory insult and abuse). Slupski's use of the word "boy" when addressing Plaintiff on one occasion simply cannot amount to a "discriminatory change in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (internal quotation marks citation omitted). Thus, it is insufficient to satisfy the "severe or pervasive" prong of the prima facie case. See Id. At 788, 118 S.Ct. 2275 (noting that isolated incidents of abusive language will generally not meet requisite threshold of

severity or pervasiveness) (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80-82, 118, S.Ct. 998, 140 L.Ed2d 201 (1998)).

Finally, Plaintiff's allegations regarding his conversation with Slupski (see supra at 24), and his conversations with Calandra (see supra at 24), are again isolated incidents which cannot, individually or together, be viewed as permeating Plaintiff's work environment with discriminatory insult and abuse. Granted, these conversations were offensive to Plaintiff, but these few conversations cannot be said to have been sufficiently severe or pervasive to create an abusive work environment. It is this Court's opinion that the Plaintiff has failed to present sufficient facts to withstand the Defendant 's motion for summary judgment with respect to his claim for racial harassment and hostile work environment.

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C. Second Cause of Action: Racial discrimination (disparate treatment)

Plaintiff also alleges he suffered racial

discrimination in the form of disparate treatment and termination from employment. First, the Plaintiff also claims he was subject to disparate treatment by his supervisors, and testified that the was made to do an unfair share of the paperwork; his reports were re-written by his superiors to make him look incompetent, he was not trained correctly, he had false write ups filed against him by his superiors, and he was disciplined for not following orders while other deputies were not so disciplined. The Plaintiff also alleges that he was harassed and discriminated against during field training in an effort by Defendant to have him terminated. This allegation rings false, however, because the record shows that Defendant's supervisors gave Plaintiff two chances to complete filed training and when Plaintiff would not pass, he was not terminated, but transferred to duty at the county courthouse. Lt. Col. David Brown, an African American, recommended that Plaintiff be transferred, and ultimately

recommended that he be terminated.

With respect to his adverse employment action (termination), the Plaintiff claims that he and his supervisor, Sgt. Fanger, were ordered to move a file cabinet from the courthouse back to BCSO. Plaintiff contends that both officers later were called into Captain Roper's office and reprimanded for not moving the cabinet. The Plaintiff claims that he was suspended by Roper but nothing happened to Sgt. Fanger. The record shows that he was suspended for insubordination in neglecting to obey direct orders to follow up on his workers' compensation claim, for failing to report he was still injured, and failing to provide Sgt. Wade with a status report.

There are two methods of proving a case of intentional discrimination under Title VII:

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The method set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (mixed motive) and the method established in McDonnell

Douglas Corp. v. Green, 411 U.S. 792 (1973)(pretext). Under the McDonnell Douglas paradigm of analysis, as refined in St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502 (1993), and Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the plaintiff has the initial burden of demonstrating a prima facie case of discrimination. To establish a prima facie case, plaintiff must show (1) her is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he suffered an adverse employment action; and (4) other employees who are not members of the protected class did not suffer an adverse employment action under apparently similar circumstances. Bryant v. Bell Atlantic Maryland, Inc., 288 F.3d 124, 133 (4th Cir. 2002). Under some circumstances, the fourth element can be established by presenting evidence raising an inference of discrimination. See Miles v. Dell, Inc., 429 F.3d 480, 486-87 (4th Cir. 2005); EEOC v. Sears Roebuck & Co., 243f.3d 846,

851 n.2 (4h Cir. 2001 (citing Texas Dept. Community Affairs v. Burdine, 450 U.S. 248, 254 ((1981). This is merely a burden of production, not of persuasion. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). Once the defendant has met its burden of production by producing its legitimate, nondiscriminatory reason, the sole remaining issue is "discrimination vel non." Reeves, 530 U.S. at 143, citing Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983)). In other words, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the legitimate reasons produced by the Defendant were not its

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True reasons, but were a pretext for discrimination. Reeves, 530 U.S. at 143. During all of the burden shifting scheme set forth in McDonald Douglas, the ultimate burden of proving that defendant intentionally discriminated against the plaintiff remains at all times with the

plaintiff.

The plaintiff also may proceed under the mixed motive method of establishing intentional discrimination. Under this method, a plaintiff must present sufficient evidence, direct or circumstantial, that, despite the existence of legitimate, nondiscriminatory reasons for the adverse employment action, an illegal factor (I.e. race) was a motivating factor in the decision. Hill, 354 F.3d at 284-86. Plaintiff need not show race was the sole motivating factor but only that it was a motivating factor. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). The racial bias must come a relevant decision maker. Also, the protected trait "must have actually played a role in the employer's decision making process and had a determinative influence on the outcome." Hill, 354 F.3d at 286.

Regardless of which method is used to analyze the claim, the plaintiff has the ultimate burden of presenting evidence from which a reasonable jury could conclude

defendant intentionally discriminated him based on his race. It is not necessary to decide "whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." Hawkins v. Pepsico, 203 F.3d 274, 279 (4th Cir. 2000) quoting and citing DeJarnette v. Corning, Inc., 133 F.3d 293, 299 (4th Cir. 1998)("[T]his Court does not sit as a kind of super personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination[.]" (internal quotation marks omitted)); Jiminez v. Mary Washington College, 57 F.3d 369, 377 (4th Cir. 1995) (Title VII is not a vehicle for substituting the judgment of a court for that of the employer"). It is the perception of

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The employer that is critical. Hawkins, 203 F.3d at 280. Even a reasoned decision based on incorrect facts is not evidence of pretext. Pollard v. Rea Magnet Wire Co., 824 F.3d 557, 559 (7th Cir. 1987), cert. denied, 484 U.S.

977 (1987).

In the present case, Plaintiff meets the first and third prongs of the prima facie case of race discrimination: as a black male, he is a member of a protected class and he suffered an adverse employment action when the Defendant terminated his employment. Furthermore, then Defendant has conceded by Brief that Plaintiff also med the second prong of the test ((2) he was qualified for his job and his job performance was satisfactory) by stating: "[Plaintiff's] performance evaluations a year before [events leading to his termination] show that his performance had improved."9 Nevertheless, the Defendant argues that its reasons for terminating Plaintiff are supported by legitimate, non-discriminatory reasons. According to Defendant, at some time around November 18, 2005, Sgt. Jackie Wade, an African American Female, found out that the Plaintiff was still having physical problems from his motor vehicle accident. According to Sgt. Wade, Sgt. Wade and Lt. Mattox spoke to

Plaintiff about his medical problems. Sgt. Wade instructed Plaintiff to contact Mr. Jan Watts, Beaufort County Risk Management, for assistance with those problems and his workers compensation claim, and provide a status report to her. The Plaintiff failed to provide any information to Sgt. Wade. On December 9, 2004, Sgt. Wade told Plaintiff to take the criminal case file cabinet from the courthouse to the Beaufort County Law enforcement Complex. Plaintiff told Sgt. Wade that he was experiencing pain from his automobile accident, and that he had not gone to a doctor. Sgt. Wade told Plaintiff to make an appointment to see a doctor. On December 10, Sgt. Wade talked

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9 Defendant's Memorandum [22-2] at p. 12

To Lt. Mattox, who told her to contact Mr. Watts regarding the status of Plaintiff's claim; Watts told Sgt. Wade that he had told Plaintiff to seek medical attention from a private physician to determine whether his

pain was due to the March 2004 vehicle collision.

Sgt. Wade recommended termination of Plaintiff's employment to Lt. Mattox because plaintiff had failed to follow three direct orders from his supervisors, which violated General Order No. 13. 10 Lt. Mattox reviewed the disciplinary memo and recommended termination to his supervisor, Captain Roper. Chief Deputy Michael Hatfield reviewed the disciplinary memo and recommended termination to his supervisor, Captain Roper. This recommendation made its way up the chain of command and was affirmed by Lt. Col. David Brown. Chief Deputy Michael Hatfield reviewed the recommendations and supporting memo and determined that Plaintiff failed to obey direct orders in violation of BCSO policy general Order No. 13. 58 The Plaintiff's termination was done pursuant to BCSO's Standard Operating Procedure No. 202.59 According to Sgt. Wade, Plaintiff was terminated because he failed to follow direct orders. not because of his race.

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In order to present a prima facie case, the Plaintiff must show that BCSO's reasons for terminating him were not insubordination but were a pretext for termination. The Plaintiff admitted that he did not report to his superiors that he was still experiencing pain from his accident as he was required to do by BCSO's Standard Operating Procedures. The Plaintiff admitted that he waited for over a month or more before contacting risk management about his re-occurrence of pain from his accident. Lastly, the Plaintiff admitted that he did not ever see a physician or make an appointment with a physician for his pain after his initial visit to Doctor's care as directed to do by Sgt. Wade. Given this evidence, the court recommends that summary

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10 Legree (nee Wade) affidavit, attached to Defendant's Memorandum as Exhibit 12.
11 Legree (nee Wade) affidavit, attached to Defendant's Memorandum as Exhibit 12.

Judgment be granted in favor of the Defendant with respect to Plaintiff's second cause of action.

D. Third Cause of Action: Retaliation and Wrongful Termination

Plaintiff also alleges that he was terminated on December 13, 2004 in retaliation for participating in protected acts of reporting racial discrimination to Lt. Mattox, Sgt. Harris, Officer Spencer, and Officer Mendoza, and opposing discrimination. For the reasons discussed below, it is recommended that summary judgment be entered in favor of the Defendant with respect to Plaintiff's third cause of action beucase he cannot establish a prima facie case of retaliation.

Title VII prohibits an employer from discriminating against an employee in retaliation for that employee's opposition to, or complaint about, an employment practice made unlawful under Title VII. See 42 U.S.C. 2000e-3(a). Protected activities may include

'opposition' or 'participation' activities. See e.g., Kubicko v. Ogden Logistics Services, 181 F.3d 544, 552 (4th Cir. 1999); 42 U.S.C. 2000e-3(a) (prohibiting discrimination against an employee for opposition to an unlawful employment practice or because the employee has made a charge or participated in an investigation under the statute.)

Recently, in Crosby v. City of Walterboro, South Carolina, 444 F.Supp.2d 559, 562-63 (D.S.C. 2006), the district court held that to establish a prima facie case of retaliation under Title VII, a plaintiff must show that: (1) he engaged in a protected activity; (2) the defendant took an adverse employment action against him; and (30 a causal connection existed between the protected activity and the adverse employment action. See e.g., Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001); Gibson v. Old Town Trolley Tours of Washington, D.C. Inc., 160 F.3d 177, 180 (4th Cir. 1998). Under the burden shifting scheme, if Plaintiff succeeds in

Proving a prima facie case, the burden of going forward shifts to Defendant to provide evidence of a legitimate non-discriminatory reason for taking the adverse employment action. See Crosby, 444 F.Supp.2d at 562 n.2, citing Matvia v. Bald Head Island Manag., 259 F.3d 261, 271 (4th Cir. 2001); Smith v. First Union Nat'l Bank, 202 F.3d 234, 248 (4th Cir. 2000) Should Defendant articulate a non-discriminatory reason, the burden then shifts back to Plaintiff to demonstrate that Defendant's proffered reason is a pretext for retaliation. Crosby, 444 F.Supp.2d at 562 n.2, citing smith. 202 F.3d at 248.

Sometime around late June or July of 2003, Plaintiff was transferred to courthouse duty due to his substandard performance while assigned to field training on road patrol. After this transfer, the Plaintiff was still under evaluation by his supervisor until they determined he was performing his duties according to BCSO standards. Plaintiff testified that shortly after he was transferred

to courthouse duty, he told Lt. Mattox, his supervisor at the courthouse, of the alleged discrimination he had faced while training. However, the record shows that he had been assigned to the Courthouse for over a year (June 2003 to December 2004) before he was disciplined and ultimately terminated. There is nothing in his courthouse duty performance evaluations to suggest that his supervisors were manufacturing reasons to have the Plaintiff terminated. To the contrary, the evaluations reveal that his performance was improving. In fact, the recommendation for the Plaintiff's disciplinary action was initiated by Sgt. Wade, to whom he never reported any racial discrimination. The disciplinary action was taken because of the Plaintiff's insubordination and violation of BCSO policy, and appears unrelated to, and too remote in time for the Court to connect the disciplinary action to with complaints the Plaintiff claims he made to Lt. Mattox over a year earlier. The recommendation for the Plaintiff's

Disciplinary action was affirmed by Lt. Mattox and was forwarded up the chain of command. The Plaintiff cannot show that there was a causal connection between his protected activity of reporting discrimination to Lt. Mattox in the summer of 2003 and his discipline and ultimate termination in December of 2004. This Court believes that Plaintiff has failed to present sufficient facts to withstand Defendant's Motion for Summary judgment with respect to his claim for retaliation.

E. Fourth Cause of Action: Wrongful Termination as a Result of Pursuing a Claim for Workers Compensation Against BCSO

Plaintiff's final cause of action alleges he was wrongfully terminated for insulting and pursuing a claim for workers compensation against BCSO. S.C. Code Ann. 41 1 80 states in pertinent part:

No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good

faith, any proceeding under the South Carolina Workers Compensation Law[.] The burden of proof is upon the employee[.] Any employer shall have as an affirmative defense to this section the following... violating specific written company policy for which the action is a stated remedy of the violation.
The statute of limitations for actions under this section is one year.

First, as discussed above, this Court finds that the Plaintiff never properly served BCSO with the complaint or the amended complaint. The plaintiff had one year from the date of his termination, December 13, 2004, to bring an action pursuant to this statute, or if the statute of limitations had run because service was effected, then properly serve the complaint within 120 days of filing the complaint. S.C.R>C.P. Rule 3(a). It is recommended that this cause of action be dismissed because the Plaintiff never properly served BCSO and the statute of limitations has run on this cause of action.

In the alternative, it is recommended that this cause of action be dismissed because BCSO has an affirmative defense to this cause of action; BCSO alleges that the Plaintiff was in violation of written BCSO policy when he failed to report his continuing medical condition to his superior officers, provide Sgt. Wade with a status report of his workers compensation claim as directed. and obtain treatment for his medical condition as directed.

The Plaintiff has the burden of showing that he would not have been terminated but for his worker's compensation claim. Wallace v. Milliken & Co., 305 S.C> 118, 406 S.E>2d 358 (1991). :To prove a workers' compensation retaliatory discharge claim under S.C. Code Section 41·1·80, a plaintiff must establish three elements: (1) institution of workers compensation proceedings; (2) discharge or demotion; and (3) a causal connection between the first two elements." Hinton v. Designer Ensemples. Inc.. 343 S.C. 236. 540

S.E>2d 94, 97 (2000) (citing Hines v. United Parcel Service, Inc., 736 F.Supp. 675, 677 (D.S>C. 1990)). The appropriate test of causation under section 41-1-80 is the determinative factor" test. Hinton, 343 S.C> at 242. 540 S.E.2d at 97 (citing Wallace v. Milliken & Co., 305 S.C> 188, 406 S.E>2d 358 (1991)). The determinative factor test requires the employee establish that he would not have been discharged "but for" the filing of the workers' compensation claim. Hinton, 343 at 242. 540 S.E.2d at 97 (citing Wallace, 305 S.C. 188, 406 S.E.2d 358).

BCSO concedes that Plaintiff filed a workers' compensation claim and that he was ultimately terminated. Significantly, however, there is no evidence in the record to suggest that Plaintiff was terminated because he filed a workers' compensation claim. The Plaintiff was terminated nine months after he filed his claim for not following up on his claim and failing to get the medical treatment he needed. Therefore, Plaintiff's claim for retaliatory termination

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Pursuant to Section 41-1-80 is without merit.

RECOMMENDATION

For the foregoing reasons, the undersigned recommends that the Defendant's Motion for Summary Judgment [22] be granted.

George C. Kosko

United States Magistrate Judge

May 4, 2007

Charleston, South Carolina

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(2)

No. 08-1036

In The

Supreme Court of the United States

CARLTON SHAW,

Petitioner,

v.

BEAUFORT COUNTY SHERIFF'S OFFICE,

Respondent.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the United States Court of Appeals for the Fourth Circuit correct in its determination that service of process on a State officer must be accomplished in the manner specified within Fed. R. Civ. P. 4(j)(2) and Rule 4(d)(5), SCRCP, and that no other method of service upon a State officer is valid?

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STATEMENT OF THE CASE

I. Facts Relevant to the Petition

This matter arises out of alleged discriminatory employment practices by the Beaufort County Sheriff and his deputies. Specifically, the Plaintiff/Petitioner alleges that members of the Sheriff's office engaged in discriminatory and retaliatory acts, towards the Petitioner, including termination of his employment, because of his race.

The Petitioner, a black male, was hired as a Sheriff's deputy with the Beaufort County Sheriff's Office in early 2003. Following completion of the South Carolina Police Academy, the Petitioner spent two weeks of field training under the supervision of two deputies, each of whom evaluated the Petitioner's performance as substandard. Instead of terminating the Petitioner, the Sheriff assigned him to courthouse security detail. Following this appointment, the Petitioner received a substandard evaluation in shotgun training, and in a four-month span, the Petitioner received seven performance evaluations that indicated he needed improvement in his driving abilities. However, the Petitioner was eventually approved for duty in November 2003.

In March 2004, the Petitioner was injured in an automobile accident while on duty. Although the Petitioner initially visited a temporary treatment medical provider, he never visited his primary treating physician for treatment of the injuries sustained in the automobile accident, despite his superior

officers ordering him to do so. The Petitioner was terminated in December 2004 for insubordination

The EEOC provided the Petitioner with a "right to sue" letter on August 31, 2005, and the Petitioner filed a Complaint in the Beaufort Division of the United States District Court for the District of South Carolina on November 21, 2005, and an Amended Complaint on March 24, 2006. The Petitioner sent the Complaint to the Respondent via certified mail, and did not personally serve the Sheriff or his clerk (although in his Petition, the Petitioner appears to imply that personal service was effected, he has previously stipulated that no personal service occurred). Finally, the Respondent denies all allegations within the Petition of racial discrimination by any member of the Beaufort County Sheriff's Office.

II. Procedural History and Opinions Below

As previously stated, the Petitioner obtained the requisite "right to sue" letter from the EEOC and filed his Complaint on November 21, 2005, and amended the Complaint on March 24, 2006. The Defendant/Respondent moved for Summary Judgment on several grounds, including improper service. The Honorable George S. Kosko, United States Magistrate Judge, issued a report recommending the Defendant/Respondent's Summary Judgment Motion be granted. The United States District Court, The Honorable Sol Blatt, Jr. presiding, in an Order dated September 27, 2007, adopted the Magistrate's Report

and Recommendation and granted Summary Judgment in favor of the Defendant/Respondent.

The Fourth Circuit Court of Appeals affirmed the District Court's ruling in an Order dated November 13, 2008, and without oral argument.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE PETITIONER FAILED TO FOLLOW THE WELL-ESTABLISHED RULES REGARDING SERVICE OF PROCESS FOR STATE AGENCIES AND OFFICIALS.

I. Timely Service

"A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. The Petitioner is correct that he met this threshold requirement. However, Rule 3 must be read together with Fed. R. Civ. P. 4, which establishes a 120-day limit for service upon a Defendant and places the burden for service upon the Plaintiff. "The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m). . . ." *Id.* This is where the Petitioner failed.

No proof exists that the Petitioner ever delivered, by any conveyance, the original Complaint to the Respondent. The Petitioner admitted in his Joint Factual Brief that he did not serve the Sheriff or his clerk. Although he attempted delivery of the

Amended Complaint by certified mail, this method of service is improper. The Respondent timely objected to this method of service in its Answer and perfected its objection by the Motion for Summary Judgment.

The District Court may extend the time for serving process upon a showing of good cause. Fed. R. Civ. P. 4(m). However, despite being on notice of the Respondent's position, there is nothing in the record to indicate the Petitioner asked the Court to extend the time for service. Further, there is no evidence in the record to indicate the Petitioner asked the Respondent to accept service of either the Complaint or Amended Complaint, as contemplated by Fed. R. Civ. P. 4(d).

The Fourth Circuit Court of Appeals correctly affirmed the District Court's finding that the Petitioner failed to timely serve the Complaint.

II. Proper Service

A. The Beaufort County Sheriff and his deputies are State Officers.

The District Court correctly determined, and the Fourth Circuit affirmed, that the Respondent is a State officer or agency. In South Carolina, Sheriffs and their deputies are State officials, not county agents. *Cone v. Nettles*, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992). "[I]t is well established in South Carolina case law that law enforcement at the county level is the exclusive province of the sheriff." *Patel v. McIntyre*, 667 F. Supp. 1131, 1146 (D.S.C. 1987).

The office of the Beaufort County Sheriff is established by the South Carolina Constitution. S.C. Const. Ann. Art. V, §24. Therefore, the Sheriff, along with his deputies, are state officers. "[T]he threshold issue here is whether sheriffs and deputies are state officials. We hold they are." *Cone* at 112.

Although the Petitioner appears to concede that that Sheriff himself is a State official, he asserts that he sued the Office of the Sheriff, not the individual. He claims this distinction allows him to treat the Sheriff's Office as an arm of the county or as a municipal corporation. The law of South Carolina simply cannot be twisted to produce such a result.

In support of his position, the Petitioner cites a workers' compensation case from 1943 and a 1920 case interpreting the South Carolina Code of Laws of 1912. However, these decisions are not applicable to the case at bar.

The issue in the workers' compensation case was not whether a deputy was a county or state official, but rather whether a deputy is the Sheriff's alter ego. *Willis v. Aiken County*, 203 S.C. 96, 26 S.E.2d 313, 315 (1943). Moreover, the statute cited in the decision states, in part, "the term 'employee' shall include all officers and employees of the State . . . " *Willis*, 203 S.C. 96, 26 S.E.2d at 314. Therefore, the Court's decision was not affected by the status of a deputy as a state or county official.

Finally, legislation enacted in 1962, and contained within the South Carolina Code of Laws of

1976, clarified the powers and form of South Carolina county and municipal government. This legislation, now contained within S.C. Code Ann. §4-9-10, *et seq.*, establishes the form and structure of county government and restricts counties from exercising any authority over a Sheriff. "With the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over any elected official of the county whose offices were created either by the Constitution or by the general law of the State." S.C. Code Ann. §4-9-650 (1976).

The federal Courts recognized this distinction early on:

> It has long been clear that the County has no authority over the Sheriff or his deputies as to the matters of hiring, firing, training, discipline or the manner in which the duties of the office are carried out. The sheriff in South Carolina has under common law and statutes always been solely responsible for his own acts and those of his deputies.

Allen v. Fidelity & Deposit Co., 515 F. Supp. 1185, 1190 (D.S.C. 1981).

The Petitioner's attempt to distinguish the term "Sheriff's Office" from that of the Sheriff himself is unavailing. It is patently clear that the Sheriff's office exists only as a mechanism for the Sheriff and his deputies to execute their duties as outlined in the South Carolina Constitution and Code of Laws. The Petitioner's argument is simply without merit. Given

the wealth of federal and South Carolina authority cited herein, there can be no doubt that the Sheriff's Office, consisting entirely of state officials, is a State agency.

B. Service of process may not be accomplished by mail.

According to the Federal Rules of Civil Procedure:

> A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:
>
> (A) delivering a copy of the summons and of the complaint to its chief executive officer; or
>
> (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

Fed. R. Civ. P. 4(j)(2).

The Petitioner's attorney simply sent the Summons and Complaint to the Respondent via certified mail. The Federal Rules require delivery to the Respondent's chief executive officer. The Rules are clear that delivery does not include mailing.

The second paragraph of the Rule allows the Petitioner to resort to the State Rules. However, even under the South Carolina Rules of Civil Procedure, the Petitioner failed to properly serve the Respondent. Rule 4(d)(5), SCRCP, states, in part: "(5) *State Officer*

or Agency. Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. . . ."

Under either Rule, the Petitioner failed to properly serve the Respondent, and the lower Courts were correct to so find.

Even if the Court views this issue in light of the Petitioner's assertion that the Office of the Sheriff is a county or municipal corporation, the analysis fails. Federal Rule 4(j)(2) still requires personal service. The South Carolina Rules are equally unavailing. Rule 4(d)(6), SCRCP, mandates service "Upon a municipal corporation, county or other governmental or political subdivision subject to suit, by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof. . . ."

By the Petitioner's own admission, he failed to personally serve the Respondent. The Rules require that he do so. The District Court's conclusion was correct, the Fourth Circuit Court of Appeals properly affirmed, and this Supreme Court should deny the Petition for Writ of Certiorari.

CONCLUSION

Despite the Petitioner's attempt to muddy the clear waters of law regarding the requirements for service of a summons and complaint on a Sheriff or his deputies, his argument is unavailing. South Carolina law clearly states that Sheriffs and their deputies are State officials. Moreover, there is no applicable case law that supports the idea that the Office of the Sheriff is a county body. Therefore, service must be effected through the plainly-stated rules established for service on state officials and agencies. As the Petitioner failed to follow these well-established rules, the District Court correctly granted Summary Judgment and the Court of Appeals properly affirmed. This Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

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